Supreme Court, U.S.
FILED

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No.

In the

# Supreme Court of the United States

ASHLEY CREEK PHOSPHATE CO.
&
STATE OF UTAH

*Petitioners,*

*v.*

CHEVRON USA, INC. et al.

*Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

E. Craig Smay
*Counsel of Record*
c/o E. Craig Smay, P.C.
174 E. South Temple
Salt Lake City, UT 84111
(801) 539-8515
*Attorney for Petitioner.*

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## QUESTIONS PRESENTED

1. May antitrust defendants who refused to publish a just and reasonable tariff for a common carrier pipeline essential to competitors' entry into business, assert as a defense that plaintiff lacks standing to claim injury to business under Section 4 of the Clayton Act because, without such a tariff, plaintiff could not complete preparations to enter?

2. Does it constitute "injury to property" for purposes of Section 4 of the Clayton Act, to deprive a competitor of the commercial use of its real property, by charging, for use of the competitor's established right of access to such property through an essential common carrier pipeline, only rates found illegal under the Interstate Commerce Act ("ICA") by the Interstate Commerce Commission/Surface Transportation Board ("ICC/STB") because they exceed the highest price competition would allow?

3. Does it defeat standing to sue for such injury that such interference with property rights occurs prior to the ripening into a "business" of on-going efforts to develop the realty, so as to also sustain an "injury to business" under Section 4?

4. Does the holding of the Tenth Circuit Court of Appeals that no claim of antitrust injury to commercial real estate will lie which does not also qualify as a claim of injury to a business exploiting such realty, conflict with the Supreme Court's ruling in Reiter v. Sonotone Corp., 442 U.S. 330 (1979)?

5. Where, upon referral from the District Court, the ICC/STB determines that defendants published for an essential common carrier pipeline, at all times pertinent to the Complaint, only illegal rates in excess of what competition would allow, may the District Court ignore or set aside the agency's ruling on the basis of modification of the tariff long after the ruling?

6. Does the failure of the Court of Appeals to reverse such a ruling by the District Court and to enforce according to their terms Decisions of the ICC and STB in this matter, conflict with the Supreme Court's rulings in Great Northern Ry. v. Merchants Elevator Co., 259 U.S. 285 (1932); Georgia Pub. Serv. Comm'n v. United States, 283 U.S. 765 (1930); United States v. New River Co., 265 U.S. 533 (1923)?

7. Where plaintiff had successfully taken all steps then reasonable or appropriate to take to commence development of its property, on the date defendant illegally refused to publish a tariff for a common carrier pipeline essential to such development, may the District Court treat failure thereafter to take further steps necessary to commence development as undisputed evidence of lack of intent or inability to enter, and decline to submit to the jury evidence that, given a legal tariff, plaintiff could and would have developed the property?

8. Where the defendants thereafter publish only illegal, anti-competitive rates for the essential pipeline, may the District Court treat failure to resume preparations to enter as undisputed evidence of lack of intent or inability to enter, and decline to submit to the jury evidence that,

given a legal tariff, plaintiff could and would have developed the property?

9. Where withholding of an essential facility is shown, should inquiry whether plaintiff was "injured in his business" under Section 4 of the Clayton Act by being kept out of business, shift from whether plaintiff thereafter completed sufficient "preparations to enter" prior to filing suit, to whether plaintiff then had appropriate wherewithal to enter and would otherwise have done so successfully?

10. Does the Tenth Circuit Court of Appeals' ruling to the contrary conflict with rulings of other court of appeals?

## PARTIES TO THE PROCEEDING

Including the parties named in the caption of this Petition, the parties are:

PETITIONERS: The State of Utah and Ashley Creek Phosphate Co., a nongovernmental corporate party to the proceedings before the United States District Court, District of Utah, and the United States Court of Appeals for the Tenth Circuit. Ashley Creek Phosphate Co. discloses that it is a Utah corporation, without parent corporations, and that no publicly held company owns more than ten percent (10%) of Ashley Creek Phosphate Co.'s stock.

RESPONDENTS: "Chevron" herein refers to one or more of defendants and appellees Chevron Corporation, Chevron U.S.A. Inc., Chevron Chemical Company, Chevron Pipe Line Company, and Chevron Industries, Inc. Chevron U.S.A. Inc., Chevron Pipe Line Company, and Chevron Industries, Inc. are wholly owned by Chevron Corporation. Chevron Chemical Company is a division of Chevron U.S.A. Inc. No corporation owns 10% or more of Chevron Corporation.

J.R. Simplot Company has no parent corporations and no publicly held company owns 10% of its stock. Farmland Industries, Inc. has no parent corporations and no publicly held company owns 10% of its stock. SF Pipeline Limited Company, a limited liability company has a parent company, SF Phosphates Limited Company, a limited liability company. No publicly held company owns more than ten percent 10% of SF Pipeline. SF Phosphates' and FS, Inc.'s parent companies are Simplot

and Farmland. No publicly held company, except Farmland, owns more than 10% of SF Phosphates or FS, Inc.

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PETITION FOR A WRIT OF CERTIORARI TO
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ASHLEY CREEK PHOSPHATE CO., Petitioner, by undersigned counsel, under appropriate rules of this Court, requests that this Court issue a writ of certiorari to the United States Court of Appeals for the Tenth Circuit.

## OPINIONS BELOW

The opinion of the District Court, District of Utah, in this matter appears at 129 F.Supp.2d 1299 (2000).

The opinion of the Tenth Circuit Court of Appeals herein appears at 315 F.3d 1245 (2003).

A preliminary ruling of the Interstate Commerce Commission appears in Ashley Creek Phosphate Co. v. Chevron Pipe Line Co., 5 I.C.C.2d 303 (1989).

A ruling of the Surface Transportation Board, upon referral from the District Court, appears in Ashley Creek Phosphate Co. v. Chevron Pipe Line Co., Nos. 40131, 40810, 1996 WL 625471 (S.T.B. 1996).

## JURISDICTION

The Decision of the Court of Appeals was filed January 2, 2003. A Petition for Rehearing was denied January 22,2003. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

## STATUTORY PROVISIONS INVOLVED

Section 4 of the Clayton Act, 15 U.S.C. Section 15(a), provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any District Court of the United States . . . without respect to the amount in controversy. . . .

## STATEMENT OF THE CASE

The parties control, by ownership or lease, what has been called in this matter the "Vernal phosphate field" in northeast Utah. The Vernal field is remote from rail transport essential to phosphate development in the west, which historically limited its development.

Petitioner Ashley Creek Phosphate Company ("ACP") leases from the State of Utah the part of the field not owned by defendants. Plaintiff's portion is State School Trust Lands, acquired by lieu selection from the United States for phosphate development. As a result, it includes a right of ingress and egress over surrounding federal lands for such development. Utah v. Andrus, 486 F.Supp. 995 (D. Utah 1979).

Defendant Chevron is the SF Defendants' predecessor in interest. To enable development of its part of the Vernal field, Chevron in 1984 sought a right-of-way over federal land between Vernal and the railhead at Rock Springs, Wyoming, for a phosphate slurry pipeline. In discharge of its obligation to provide access over federal lands for the State's lands, the BLM required that the Chevron pipeline be a common carrier, providing capacity and regulated rates for shipments by ACP. Otherwise, the BLM refused ACP a further right-of-way, or direct participation in the Chevron line. Chevron represented that the pipeline would be a common carrier under the Interstate Commerce Act ("ICA") in any case.

Chevron constructed a mine and beneficiating plant at Vernal, and a phosphate fertilizer plant at Rock Springs, connected with the phosphate slurry pipeline by 1986. Ashley Creek, following the commitment to common carriage, also commenced development of its property. By 1986, Ashley had explored and tested its properties, demonstrating their suitability, preliminarily designed a mine and processing plant, and performed a preliminary feasibility study showing profitability of an operation selling phosphate concentrate through the Rock Springs railhead to fertilizer plants competing with the new Chevron plant in the "Western market" for phosphate fertilizer.

As of 1986, the parties controlled competing parts of the Vernal phosphate field, and shared access rights in a federal right-of-way connecting the field to a railhead essential to its development. In addition to its right, by virtue of its leases, to the reserves and the access, ACP

was entitled to common carriage under the ICA in the pipeline Chevron controlled in the federal right-of-way.

In 1986, Chevron commenced operation of the pipeline, delivering phosphate concentrate to its plant at Rock Springs and to a Canadian plant, refusing to publish a tariff of reasonable rates for shipments by ACP.

ACP then deferred its preparations to enter competition, and with the State of Utah brought action in the Interstate Commerce Commission ("ICC") to obtain a tariff. In 1989, the ICC ordered publication of a tariff forthwith (the "ICC Decision"). The ICC determined that, upon request in 1986, ACP had a right under the ICA to publication of a "just and reasonable tariff" to provide reliable information with which to plan and to make a decision whether to enter.

In 1989, Chevron published a tariff. The tariff was unreasonable, as subsequently determined by the ICC/STB. In 1989, petitioner and the State of Utah brought an action against Chevron in the District Court under the Sherman and Clayton Antitrust Acts asserting in various counts monopolization by withholding of reasonable access to an essential facility, the pipeline. The Complaint asserts monopolization of production and sales in the Vernal field, of transport in the pipeline, and of production and sale of phosphate fertilizer in the western United States. The issue of the reasonableness of the published rates was then referred to the ICC, and the antitrust action was stayed.

In 1991 and 1992, Chevron published new tariffs. Both have been found unreasonable. In 1992, Chevron

sold its mine-pipeline-fertilizer plant complex to the SF Defendants, which adopted the third tariff. Plaintiff did not re-institute preparations to commence mining following publication of the three tariffs.

The Complaint was amended in 1996 to join the SF Defendants, and to add claims seeking divestiture of an appropriate share of the pipeline to petitioner. Later in 1996, the STB, successor of the ICC, issued a Decision on its referral from the District Court, finding that all three of defendants' tariffs since 1989 had been "unreasonable" at all volumes the parties had claimed would be shipped if plaintiff entered. The ruling was made the law of the case by Judge David Sam.

The SF Defendants asserted that the STB Decision could be read to find only the first two tariffs unreasonable, and it made an agreement with the State not to raise the prevailing tariff. Judge Sam subsequently rejected the claim of authority to so read the STB Decision.

In 1998, the matter was re-assigned to new District Judge Dale A. Kimball. Later in 1998, the Amended Complaint was further amended to add claims that defendants' behavior constituted violation of petitioner's property rights under State law and federal public lands law.

In January 1999, the SF Defendants lowered the prevailing tariff to what they claimed was the minimum. They subsequently filed motions to dismiss and for summary judgment alleging generally that plaintiff lacked standing under Section 4 of the Clayton Act

because its preparations to enter to the date of refusal of a tariff, not resumed following the publication of unreasonable tariffs, were insufficient to constitute a "business" to be injured. They also asserted, upon theories indistinguishable from those previously rejected, that publication of a minimal tariff in 1999 had rendered the first three tariffs reasonable.

The motions were specifically put forward upon the ground that defendants should not have to respond to plaintiff's expert feasibility/damage study scheduled by the court to be submitted shortly, showing when, and in what volume, plaintiff would have commenced profitable shipments of phosphate concentrate if provided a reasonable tariff. The claim was that only "preparations to enter" cotemporaneous with the violations alleged could be considered on the question of existence of a "business" to injure. The District Court announced that it would decide at the time of the hearing whether plaintiff's study was relevant.

The District Court did not dispute that plaintiff successfully took all reasonable and appropriate steps to enter competition to the point of refusal of a tariff, and acknowledged that plaintiff could not have completed a final feasibility study so long as a tariff was withheld. Judge Kimball, however, having previously held that the STB had *not* found the tariffs unreasonable, held that upon publication plaintiff was required to use the tariffs to complete a final feasibility study in order to seek financing. Failure to do so constituted failure to show sufficient "intent and preparedness" to enter business to constitute a business to injure, or a "nexus" of the violation to the injury alleged. The ruling does not

acknowledge existence of the final feasibility study done as trial preparation. In support of the ruling, the District Court held that publication of a cheap tariff in 1999 rendered all prior tariffs "reasonable" retroactively, finally eliminating the STB Decision. The tariffs never having been unreasonable, plaintiff was not excused by any "futility exception" to the "preparation" requirement, from re-instituting "preparations" upon publication of the tariffs. Finally, absent showing of a "business", plaintiff had not shown that its mineral leases could be profitably exploited; thus, it had suffered no cognizable injury to property. The District Court dismissed the complaint.

The Court of Appeals declines to reach, or to correct, the District Court's cancellation of the STB Decision. It then affirms the ruling that plaintiff was required to resume "preparations to enter" by completing a final feasibility study following publication of the tariffs, in order to have had a "business" to injure. While acknowledging that there is a "futility exception" to the rule requiring "intent and preparedness" to enter, the Court of Appeals holds that such an "exception" does not "excuse" "basic preparations" merely because defendants' behavior renders them futile. Finally, the Court of Appeals holds that a claim of interference with rights of access to commercial realty which prevents its development in competition with defendant states no claim of injury to property absent a showing that at the time of such interference plaintiff had in place a "business" of such development.

## REASONS FOR GRANTING THE WRIT

### 1. THE COURT OF APPEALS' ELIMINATION OF INJURY TO PROPERTY AS A SEPARATE GROUND FOR STANDING UNDER SECTION 4 OF THE CLAYTON ACT VIOLATES SUPREME COURT PRECEDENT AND DIMINISHES RIGHTS OF PROPERTY.

While Section 4 of the Clayton Act provides plaintiff alternative standing to contest either that his business has been injured "or" that his property has been injured, the Court of Appeals now holds that this comprehends only one kind of injury. That is, while acknowledging that defendants' refusal to publish a tariff in 1986, or publication of illegal tariffs from 1989, for an essential pipeline, states a claim of antitrust violation, the Court of Appeals holds that it was not an "injury" until plaintiff became "prepared to enter business". While this purports to be a rule of "narrow circumstances", the circumstances defined - claims of monetary losses in commerce – would comprehend virtually all claims of injury to property under Section 4. Hawaii v. Standard Oil Co., 405 U.S. 251, 264 (1972). Under the Court of Appeals' view, depriving plaintiff of the use of its property was not an injury to property at all.

In Reiter v. Sonotone Corp., 442 U.S. 330 (1979) the Supreme Court reversed a judgment that "consumers alleging no injury of a commercial or competitive nature are not injured in their property under section 4 of the Clayton Act". Id. At 336-337. The Court of Appeals' ruling directly conflicts with Reiter v. Sonotone Corp..

The word "property" in Section 4 "comprehends anything of material value owned or possessed. . . . Money . . . is a form of property". Id. at 338. The word "or" in Section 4 "makes plain that `business' was not intended to modify `property', nor was `property' intended to modify `business'. Id. at 339.

> . . . the fact that petitioner . . . was deprived of only money, albeit a modest amount, is no reason to conclude that she did not sustain a "property" injury . . . where petitioner alleges a wrongful deprivation of her money . . . she alleged an injury in her "property" under Section 4.

Id. at 340, 342. The Court of Appeals cites no authority that to allege injury due to admitted deprivation of what is concededly property, plaintiff must show the "value" of the property by proving deprivation of more than "a modest amount". Any question of the value of property of which plaintiff is deprived goes only to damage. Waldron v. British Petrol. Co., Inc., 231 F.Supp. 72, 87 (S.D. N.Y. 1964); Jayco Systems, Inc. v. Savin Business Machines Corp., 777 F.2d 306, 314, n. 21, (5 Cir. 1985).

Realty is a form of property. The law presumes that realty, like money, has value. Plaintiff's realty consisted of its mineral leases, including the right to mine and sell the minerals, and an appurtenant right of access to market through the federal right-of-way wholly occupied by the pipeline controlled by defendants, which alone provided access to market. Plaintiff was deprived of its property right of access, and consequently, of its property right to develop and sell its reserves by

defendants' refusal of reasonable pipeline tariffs. This alleges injury to plaintiff's property, notwithstanding the Court of Appeals' sneer that it wasn't much property. It is an injury to property to deprive the owner of its use, by interference with rights of use part of it, notwithstanding he is not deprived of the title.

The District Court's finding, erroneous as a matter of law, that plaintiff's leases only hold value to the extent they could be developed, if correct, would be all the finding of value necessary for standing to claim injury to property. It concedes that the leases have a value which can be realized if plaintiff is permitted to compete.[1]

Whether plaintiff would have successfully realized the monetary value of its property is a question of damages, which does not arise on a motion for summary judgment as to standing. Id. Such a question cannot be disposed of, on summary judgment, by the District Court's conclusion that plaintiff's "preparations" to the date of the violation were not then "business". There was nothing in the evidence below which was *inconsistent* with plaintiff's ultimate success. The preliminary feasibility study to which the court objected was wholly consistent with ultimate success. The proffered study showed contemporaneous market, costs, prices, and

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[1] It could not do otherwise given the voluminous uncontested evidence in this record that the leases hold vast quantities of commercial phosphate ore, which defendants' development of the adjoining, similar property demonstrates can be developed at substantial profit. The Court of Appeals' remark about a "scintilla" of evidence of value is a mistake of fact as well as of law.

profitability. The District Court on this record could not have resolved the issue of "viability" of plaintiff's proposed development.

It is immaterial that defendants did not physically block plaintiff's right of access, or did not reject phosphate concentrate actually tendered for shipment. Defendants'pipeline occupied the one right-of-way which satisfied plaintiff's right of access to market under the ICA and its leases with the State. Defendants charged a monopoly price to exercise plaintiff's right of passage through the federal right-of-way. They gave plaintiff a choice of deprivation of its money, or deprivation of its property rights. No alternative was offered which did not deprive plaintiff of property. They prolonged the deprivation by insisting upon a rate protest proceeding.

The Tenth Circuit's ruling on injury to property is the circularity that so long as defendant prevents plaintiff developing its property, the property has no value; therefore, plaintiff has no standing to complain that defendants prevent plaintiff from developing its property.

It is as illegal under Section 2 of the Sherman Act to keep a competitor out of business as it is to drive a competitor out of business. American Banana Co. v. United Fruit Co., 166 F. 261, 264 (2 Cir. 1908); Denver Petrol. Corp. v. Shell Oil Co., 306 F.Supp. 289, 308 (D.Colo. 1969). The rule underlying the Court of Appeals' application of the "intent and preparation" test is that there can be no "injury" to a non-existing "business". That rule does not reach a claim that diminishment of real property rights which prevents commercial development of the property is an injury to

property. Cf., The Pipeline Cases, 234 U.S. 548 (1913); Woods Exploration and Producing Co. v. ALCOA, 438 F.2d 1286 (5th Cir. 1971) cert. den. 401 U.S. 1047 (1972).

Interference with real property rights, such as deprivation of a right of access for commercial development, which keeps the owner out of the business of using his property for the purposes to which it is adopted, is an injury to property under Section 2 of the Sherman Act and Section 4 of the Clayton Act.

That the interference occurs early in the effort at development, allegedly rendering speculative whether substantial earnings would have been obtained, raises questions of damages, not standing. Waldron, supra; Jayco Systems, supra.

It is not dispositive that those deprived of use of their property have an injunctive action without more. Petitioner brought such an action, first in the ICC, then in the District Court, which deferred to the ICC. In both instances, defendants were legally required, and had opportunity, to voluntarily correct their behavior. They refused and insisted upon ten years of regulatory proceedings. Thereafter, no further injunctive relief was needed, and an action lay for the decade of damages caused by non-compliance with the duty to provide reasonable rates.

The Court of Appeals' ruling permits the owner of part of a commercial mineral field to prevent competitive development of the remainder of the field, by illegal abuse of a jointly held right of access to market. See Pipeline Cases, supra; Woods Exploration, supra; Denver

Petroleum, supra; TCA Building Co. v. Northwestern Resources Co., 861 F.Supp. 1366 (S.D.Tex. 1994). The ruling diminishes the appropriate reach of the antitrust laws, and real property rights wherever they are implicated under the antitrust laws. It adversely impacts the development of public mineral lands throughout the west.

## 2. THE STB DECISION MAY NOT BE ALTERED OR IGNORED.

The District Court and the Court of Appeals have declined to enforce by their terms determinations by the ICC and STB of matters central to the litigation, in violation of substantial Supreme Court authority.

The STB Decision that all of defendants' tariffs were unreasonable at all relevant shipping volumes was made upon referral from the District Court, upon representation of both parties that the determination would resolve the factual issue whether any access defendants had provided to the essential pipeline had been reasonable. The Decision became the law of the case.

The STB found defendants' rates unreasonable as exceeding the maximum competition would permit. ACP v. Chevron Pipe Line Co., Nos. 40131 (Sub No. 1), 40810 (STB 1996) at 30-31. The ruling, in effect, identifies defendants' rates as monopoly prices for the essential transport.

The ruling that the rates exceeded the maximum amount, including a reasonable profit, reasonably necessary to provide the transport (Id. at 12-14, 30-31),

creates a prima facia case that defendants, shipping on their own line, obtained the transport cheaper than any competitor charged the tariffs. CF Industries Inc. v. Koch Pipeline Co., L.P., STB Docket No. 41685 (May 3, 2000). Such discrimination constituted withholding of reasonable access to the essential pipeline. Aspen Highlands v. Aspen Skiing Corp., 738 F.2d 1509, 1518 (10 Cir. 1984), aff'd 472 U.S. 585 (1985).

The STB Decision builds upon an earlier Decision of the ICC, *res judicata* between the parties, ordering Chevron to publish a "just and reasonable" tariff, because such a tariff was essential to any decision of plaintiff whether to enter business, and to any plan of the timing, size, and type of project to undertake. ACP v. Chevron Pipe Line Co., 5 ICC 2d 303, 310-313 (1989). The ICC prescribed guidelines pursuant to which the tariff was required to provide plaintiff "the best available information for its business planning purposes". Id.

The STB Decision establishes that defendants were in violation of the ICC Decision.

An unreasonable tariff, by definition, exceeds what competition will allow. It is a false statement of competitive transport prices otherwise available in the market. An unreasonable tariff cannot be the basis of an accurate or reliable plan. Assuming other costs and prices are competitive, conclusions about competitiveness, profitability and entry incorporating a tariff competition will reject, must be negative.

Publication of unreasonable tariffs not only withheld the information the ICC had determined was

essential to plaintiff to plan, it deterred preparations to enter by preventing any positive recommendation to seek entry. It withheld reasonable access to the essential facility pipeline as a matter of law. City of Chanute v. Williams Natural Gas Co., 955 F.2d 641, 648-649 (10 Cir. 1992), cert. den. 506 U.S. 831 (1982).

The STB Decision substantiated plaintiff's assertion that publication of unreasonable tariffs, like refusal of a tariff, rendered further preparations futile: the ICC Decision established that, absent a reasonable tariff, further rational preparations were not even possible. To avoid that result, the District Court effectively set the STB Decision aside, holding on an earlier motion that the STB had not found the tariffs unreasonable, then holding that publication of a cheap tariff in 1999 had rendered all tariffs always reasonable. Thus, the District Court treated that publication of the tariffs as fulfilling the ICC's order, and plaintiff was required thereafter to proceed with planning and 'preparations to enter".

The District Court lacked any authority to alter such an agency decision. Its ruling in this regard is in direct conflict with substantial Supreme Court authority.

> . . . it was not within the province of the District Court, in reviewing the determination of the [Interstate Commerce] Commission on the issue, to consider *ab initio* the question whether the application of the tariffs as interpreted by the Commission, would result in unlawful discrimination in violation of Section 2 of the Interstate Commerce Act. . . . The inquiry involves

> the exercise of discretion in a technical field requiring the expertise of the Commission, whether it is conducted to determine if a party in the past has been wronged, a judicial function, or to determine what rate or practice shall be deemed reasonable in the future, a legislative function. Great Northern Ry. V. Merchants Elevator Co., 259 U.S. 285 (1932).

Indiana Harbor Belt Railroad Co. v. United States, 510 F.2d 644, 649 (7 Cir. 1975), cert. den. 422 U.S. 1042 (1975), reh. den. 423 U.S. 884 (1976).

Any question whether the STB Decision had been altered by publication of a subsequent tariff – "what rate or practice shall be deemed reasonable in the future" – was required to be submitted to the STB in the first instance. Great Northern Ry. v. Merchants Elevator Co., supra; Indiana Harbor Belt Railroad Co. v. United States, supra.

The Court of Appeals treats the District Court's ruling on standing as coherent even if defendants' tariffs were unreasonable. If the STB Decision that the tariffs were unreasonable is not eliminated, the Court of Appeals' requirement that plaintiff resume planning following publication of the tariffs eliminates the ICC Decision.

It was not within the province of the Court of Appeals, upon the ground of abjuring to decide whether the District Court's ruling that the tariffs were reasonable was right or wrong, to decline to enforce the STB

Decision that the tariffs were unreasonable, or the ICC Decision that a reasonable tariff was essential to resuming "preparations to enter".

> The Court will not review determinations of the Commission made within the scope of its powers or substitute their judgment for its finding and conclusions.

United States v. New River Co., 265 U.S. 533, 542 (1923).

> It is not our province to inquire into the soundness of the Commission's reasoning, the wisdom of its decision, or the consistency of its conclusions with those reached in similar cases.

Georgia Pub. Serv. Comm'n v. United States, 283 U.S. 765, 775 (1930). There being no power to question the ICC Decision or the STB Decision, there was no power to ignore them.

There is no question that the STB found defendants' tariffs unreasonable at all pertinent times, nor that such a ruling imports that such tariffs discriminate in favor of a carrier-shipper, such as defendants, against competing shippers, such as plaintiff. The STB has so held at the urging of one of the defendants. CF Industries Inc. v. Koch Pipeline Co., L.P., STB Docket No. 41685 (May 3, 2000), at 28-29. Defendants' records show that the discrimination exceeded $4.50/ton of phosphate concentrate sold at destination for $32.50/ton, at all relevant times. There is no question that such

discrimination constitutes withholding of reasonable access to an essential facility. Chanute, supra, 655 F.2d at 648. The ICC plainly held that refusal of a reasonable tariff violated a legal right to information essential to planning for entry.

The District Court's ruling on reasonableness of defendants' rates cannot be left standing as a precedent, because it contradicts the STB and exceeds the court's authority. The Court of Appeals is equally bound by the STB Decision, and thus bound by the prior ICC Decision. Taken together, these decisions establish that defendants, by serial illegal acts, prevented petitioner entering competition by withholding information essential to planning and deciding whether to enter.

## 3. THE COURT OF APPEALS' REQUIREMENT OF A FEASIBILITY STUDY INCORPORATING ILLEGAL TARIFFS CREATES AN IRRATIONAL AND IMPROPER TEST OF STANDING.

The ICC Decision established that defendants, as pipeline operators, had two distinct legal duties to plaintiff. Beginning in mid-1986, defendants were required to provide pipeline transport when requested at "just and reasonable rates"; they were also required to publish these rates in a tariff as requested, thereby reliably and accurately informing plaintiff of appropriate rates, and subjecting them to regulation.

A "just and reasonable" tariff would inform plaintiff what competitive costs of essential transport it could reliably expect to pay over time. Thus, it could determine what time, if any, it should commence development of its leases in order to have available a

supply of phosphate concentrate at an appropriate price, including pipeline transport, when the market demanded it. When the latter time came, defendants were required to provide the pipeline transport at the "just and reasonable" price.

Had defendants complied with their obligation to inform plaintiff, and had plaintiff prepared to meet the market by constructing mining and beneficiating facilities and entering supply contracts, defendants would have been liable for injury to plaintiff's "business" if they demanded for transport more than the "just and reasonable" rate. That is, defendants concededly would be liable had they complied with their first obligation of accurate information, then failed of their obligation of reasonable transport. They are now held not to be liable because they failed and refused to comply with both obligations.

At the time of the motion below, there was shortly due to be delivered to the District Court on its discovery schedule an expert report showing when plaintiff would have begun making profitable deliveries to customers had defendants provided a "just and reasonable" tariff. The study was delivered on schedule, prior to decision of the motion. It shows that, properly informed by Chevron, plaintiff would have commenced development of its leases to begin profitable deliveries at the latest shortly after the SF Defendants acquired the pipeline. It also shows that at the rates actually charged by defendants, plaintiff would have been well advised not to enter.

The STB Decision in 1996 determined that beginning in 1989, the information defendants provided plaintiff of available pipeline charges was false.

Indulging defendants' claim that their tariffs were proper, plaintiff did the right thing: it correctly concluded that the rates imperiled its profitability and it deferred further efforts to enter. Meanwhile, if it sought transport at proper rates, plaintiff had no option but to pursue a lengthy rate protest proceeding. Defendants refused the opportunity provided to voluntarily correct the tariffs, and the ICC/STB would not set the tariffs aside pending completion of the proceeding. Thus, meanwhile, and for at least two and a half years following the STB Decision, defendants failed in their obligation to provide transport at "just and reasonable" rates.

The Court of Appeals creates for such behavior the defense of lack of standing from the fact that by also failing in its obligation to provide proper information defendants deterred plaintiff from preparing to ship.

The Court of Appeals holds that recognizing standing to sue for being kept out of business in such circumstances, under the "futility exception" to the "intent and preparation" rule, would eliminate any standing requirement. In fact, the "futility exception" simply alters, in order to address the nature of defendants' misbehavior, the proof permissible to establish injury to business. Plaintiff must always show the injury in order to prove damages. It is simply not limited in carrying this burden to proof of "preparations" completed before suit.

It is recognized that enterprises in the planning stage may have standing to sue for damages for injury to business. "Business" as used in Section 4 of the Clayton Act does not mean only on-going businesses, or even businesses fully prepared and at the instant of "entry". ABA Section of Antitrust Law, Antitrust Law Developments 842 & n.38 (5th Ed. 2002) (collecting cases).

As proof of damages requires proof that plaintiff *would* have completed planning, entered successfully and had earnings, this concedes that some proof other than actual completion of preparations and entry must be permissible in all such cases. The "futility exception" merely defines the point at which prospective proof becomes acceptable as that point when defendant's behavior recognizably deters plaintiff making further preparations. Fleer Corp. v. Topps Chewing Gum, Inc., 415 F. Supp. 176, 188 (E.D. Pa. 1976); Hecht v. Pro-Football, Inc., 570 F.2d 982, 988 (D.C.Cir. 1977), cert. den. 436 U.S. 956, 98 S.Ct. 3069, 57 L.Ed.2d 1121 (1978); Huron Valley Hosp., Inc. v. City of Pontiac, 666 F.2d 1029, 1033 (6 Cir. 1981); Jayco Systems, Inc. v. Savin Business Machines Corp., 777 F.2d 306, 315 (5 Cir. 1985); Thompson v. Metropolitan Multi-List, Inc., 934 F.2d 1566, 1572 (11 Cir. 1991).

This does not permit plaintiff to succeed merely by showing, for example, an essential facility violation. Even where such a violation occurred early in plaintiff's preparations, plaintiff would still have to show the availability to it at all pertinent times of appropriate wherewithal to succeed, such as resources, opportunity and market. Further, plaintiff would always have to show

intent. The latter requirement probably could not be fulfilled absent a showing of substantial activity and commitment to enter prior to the violation.

There is no reason that evidence of wherewithal to succeed compiled in preparation for trial necessarily would be more speculative than evidence assembled before suit. In the present case, for example, a feasibility study done as the Court of Appeals requires, incorporating the illegal tariffs, would have produced false and inaccurate conclusions about profitability; the subsequently produced study presents a true picture. The facts assembled and digested are the same facts as would have been assemble at the time of publication of the tariffs, with the exception that the facts regarding rates payable are true.

Indeed, the pertinent evidentiary reason for requiring plaintiff to have taken in ordinary course the preparatory steps it was not deterred by defendant from taking, appears to be to demonstrate intent. "Nexus" between loss and violation is permissibly shown by subsequently compiled evidence. One who fails to take steps in due course without excuse renders it irreducibly speculative whether he would in fact have entered.

In that sense, the "futility exception" simply requires compliance with the ordinary functions of courts and juries, for example, under Rule 56, F.R.C.P. Once it is shown that defendant's behavior explains plaintiff's declining to proceed, a court may not regard failure to proceed as undisputed evidence of lack of intent to enter. The issue then becomes whether plaintiff can adduce for the jury appropriate evidence of availability of

wherewithal to succeed, given the general rule that a lesser degree of proof is required where unavailability of definitive proof is the fault of defendant. Zenith Corp. v. Hazeltine, 395 U.S. 100, 123-124 (1968); Bigelow v. RKO Pictures, 327 U.S. 251, 264-65 (1945). Of course, defendant may always show that plaintiff lacked appropriate wherewithal. For example, defendants here speculate, without evidence of any kind, that plaintiff's other costs would have been excessive. Nothing prevents defendants attempting to counter plaintiff's proof on this point in due course.

Instead, the Court of Appeals requires for standing that plaintiff have produced, prior to suit, a study which, due to defendants' failure of a legal obligation to plaintiff, would have inaccurately represented that plaintiff could not succeed, and thus improperly deterred "preparations to enter". The substantive antitrust purpose of such a requirement is undisclosed. Since it produces false evidence, the requirement has no legitimate evidentiary purpose.

There are no cases in which defendant's failure of an independent obligation actually truncated serious efforts to enter business by one who could demonstrate intent and appropriate wherewithal, and in which plaintiff was found to lack standing because it did not proceed following defendants' default. This includes Gas Utilities Co. of Ala., Inc. v. Southern Natural Gas Co., 825 F.Supp. 1551, (N.D. Ala. 1992) aff'd 996 F.2d 282 (11 Cir. 1993) relied upon by the Court of Appeals. It was not claimed there that defendant failed in any independent obligation, or that plaintiff was deterred from further pertinent preparations. Nothing in any of the cases cited

by the Court of Appeals requires such a result. In all such cases plaintiff would be required to show the "injury in fact" of being kept out of business, and difficulties raised by claims of speculative damages are readily addressed as in other cases by the applicable rules of evidence.[2]

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[2] The Court of Appeals has bolstered its ruling with a number of factual findings not made by the District Court. See, Ashley Creek Phosphate Co. v. Chevron USA, Inc., 315 F.3d 1245, (10 Cir. 2003) Note 1, 1249; note 15, 1260. The apparent reason why the District Court did not make such findings, though urged by defendants, was that the underlying evidence was disputed. For example, the Court of Appeals finds that "Cominco cancelled its phosphate contract with Chevron, concluding it could obtain all the phosphate it needed at a lower cost", without disclosing that the correspondence upon which the claim is based is not specific, and subject to other interpretations, and that "Neither Chevron nor . . . SF, ever sold phosphate concentrate to a third party after 1988, despite repeatedly trying to find outside purchasers", without noting that SF made no efforts to sell, or that the potential third-party "buyers" were Chevron's competitors, making it contrary to Chevron's interest to provide them cheaper supply. N. 1, pg. 1249 The Court of Appeals details "multiple failed attempts to develop [plaintiff's] phosphate deposits", without noting that all of such "attempts" pre-dated the pipeline, which made large-scale development of both parties' properties economically feasible. N. 15, pg. 1260. It's finding here that plaintiff attempted to sell the leases to Chevron and Cominco actually contradicts its finding elsewhere that "Ashley Creek never tried to sell its leases to Chevron." Pg. 1260.

Most seriously, the Court of Appeals recites plaintiff's "deposition testimony that Ashley Creek would not move forward with its project, regardless of the amount of the tariff, without owning a forty percent (40%) share of the pipeline." Pg 1256. No such testimony exists or was cited by the District Court. (The District Court cited testimony given in 1999, long after the tariffs were found unreasonable in 1996, that plaintiff "will not" proceed without prosecuting its claim, not asserted until 1996, for appropriate divestiture.) The Court of Appeals' assertion that petitioner improperly cites the statement of undisputed facts in a

## CONCLUSIONS

The Court of Appeals ruling reduces by at least half the reach of the antitrust law, while compromising real property rights whenever used in commerce. The result is not only an irrational and unnecessary limitation of standing, but endorsement of serial illegal behavior suppressing competition from development of public lands. THEREFORE, Petitioner requests that this court GRANT its Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

RESPECTFULLY SUBMITTED,

E. CRAIG SMAY
*Counsel of Record*
E. Craig Smay, P.C.
174 E. South Temple
Salt Lake City, UT 84111
(801) 539-8515

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summary judgment memorandum neglects to note that as such statement was uncontested, it was admitted, thus, the citation was appropriate.

Supreme Court, U.S.
FILED

02 1758 APR 21 2003

OFFICE OF THE CLERK

No.

In the

# Supreme Court of the United States

ASHLEY CREEK PHOSPHATE CO.
&
STATE OF UTAH
*Petitioners,*

*v.*

CHEVRON USA, INC. et al.
*Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

## APPENDIX TOPETITION FOR WRIT OF CERTIORARI

E. Craig Smay
*Counsel of Record*
c/o E. Craig Smay, P.C.
174 E. South Temple
Salt Lake City, UT 84111
(801) 539-8515
*Attorney for Petitioner.*

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# TAB 1

**PUBLISH**

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

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ASHLEY CREEK PHOSPHATE COMPANY,

Plaintiff-Counter-Defendant-Appellant,

and

STATE OF UTAH,

Plaintiff-Counter-Defendant,

No. 01-4017

v.

CHEVRON USA, INC.; SF PIPELINE LIMITED COMPANY; SF PHOSPHATES LIMITED COMPANY; J.R. SIMPLOT COMPANY; FARMLAND INDUSTRIES, INC., a Delaware corporation; CHEVRON CHEMICAL COMPANY, a Delaware Corporation; CHEVRON PIPE LINE COMPANY, a Delaware corporation;

CHEVRON CORPORATION,
a Delaware corporation,

Defendants-Counter-
Claimants-Appellees.

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ASHLEY CREEK PHOSPHATE
COMPANY,

Plaintiff-Counter-
Defendant,

and

STATE OF UTAH,-

No. 01-4031

Plaintiff-Counter-
Defendant-Appellant,

v.

CHEVRON USA, INC.;
SF PIPELINE LIMITED
COMPANY; SF PHOSPHATES
LIMITED COMPANY;
J.R. SIMPLOT COMPANY;
FARMLAND INDUSTRIES,
INC., a Delaware corporation;
CHEVRON CHEMICAL
COMPANY, a Delaware
Corporation; CHEVRON
PIPE LINE COMPANY, a

Delaware corporation;
CHEVRON CORPORATION,
a Delaware corporation,

Defendants-Counter-
Claimants-Appellees.

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**Appeal from the United States District Court for the District of Utah (D.C. Nos. 89CV-554-K and 96CV-340-K)**

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E. Craig Smay, Salt Lake City, Utah, (Philip Pugsley, Assistant Attorney General, State of Utah, Salt Lake City, Utah, with him on the briefs), for Ashley Creek Phosphate Company and State of Utah, Plaintiffs-Counter-Defendants-Appellants.

Peter W. Billings, Fabian & Clendenin, Salt Lake City, Utah, (Douglas B. Cannon, Fabian & Clendenin, Salt Lake City, Utah; James S. Jardine, Jonathan A. Dibble, and Cameron M. Hancock, of Ray, Quinney & Nebeker, Salt Lake City, Utah, with him on the briefs), for SF Pipeline Limited Company; SF Phosphates Limited Company, J.R. Simplot Company; Farmland Industries, Inc.; and FS, Inc., Defendants-Counter-Claimants-Appellees.

E. Scott Savage, (Stephen R. Waldron, with him on the briefs), Berman, Gaufin, Tomsic & Savage, Salt Lake City, Utah, for Chevron USA, Inc.; Chevron Industries, Inc.; Chevron Chemical Company; Chevron Pipe Line Company; and Chevron Corporation, Defendants-Counter-Claimants-Appellees.

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Before **KELLY**, Circuit Judge, **BRORBY**, Senior Circuit Judge, and **MURPHY**, Circuit Judge.

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**MURPHY**, Circuit Judge.

## INTRODUCTION

Ashley Creek Phosphate Company ("Ashley Creek") brought suit against Chevron Corporation and several related entities (collectively "Chevron") and J.R. Simplot Company, Farmland Industries, Inc., and three entities owned by, or operated as joint ventures between, Simplot and Farmland (collectively "SF"). Ashley Creek alleged, *inter alia*, that Chevron and SF violated various provisions of the Sherman and Clayton Acts by refusing to set reasonable tariffs for a pipeline utilized to transport phosphate concentrate slurry. The state of Utah brought claims against Chevron identical to and derivative of Ashley Creek's claims. Chevron and SF responded by filing state-law counterclaims against Ashley Creek, asserting that it had filed its complaint and initiated other proceedings in bad faith and without a justifiable basis.

The district court granted summary judgment in favor of Chevron and SF on the antitrust claims, concluding that: (1) Ashley Creek lacked standing to bring its antitrust claims; and (2) in the alternative, the tariffs announced by Chevron and SF for the use of the pipeline were reasonable. Because Utah conceded that its claims were "entirely derivative" of Ashley Creek's claims, the district court dismissed Utah's claims against Chevron on the same bases. The district court dismissed Chevron's and SF's state-law counterclaims without prejudice after disposing of all of the federal claims.

Ashley Creek appeals, contending that the district

court erred in granting summary judgment in favor of Chevron and SF on the antitrust claims (No. 01-4017) and in refusing to dismiss Chevron's and SF's state-law counterclaims with prejudice (No. 01-4066). Utah appeals the district court's grant of summary judgment to Chevron (No. 01-4031). This court exercises jurisdiction pursuant to 28 U.S.C. § 1291 and, for the reasons set out below, **affirms** in part, **dismisses** in part, **reverses** in part, and **remands** to the district court for further proceedings consistent with this opinion.

**Appeal Nos. 01-4017, -4031**

## I. BACKGROUND

The factual and procedural background of this case is lengthy and complex. We set forth only those very limited background facts necessary to put the legal dispute and this court's decision in context.

### *A. Factual/Procedural Background*

In the 1980's, Chevron built an integrated phosphate fertilizer project was to utilize sulfur by-product from Chevron's natural gas operations in Carter Creek, Wyoming. Rather than attempt to sell the sulfur to existing phosphate fertilizer producers, Chevron chose to produce phosphate fertilizer itself. Entry into the phosphate fertilizer business was consistent with Chevron's preexisting nitrogen fertilizer business and fertilizer distribution system.

In furtherance of this plan, Chevron purchased an operating phosphate mine located near Vernal, Utah. Because it was roughly equidistant between Carter Creek

and Vernal, and because it was a railhead, Chevron chose to construct its fertilizer plant in Rock Springs, Wyoming. Chevron built a pipeline to transport phosphate concentrate slurry from the Vernal mine to the fertilizer plant in Rock Springs. The pipeline runs over lands owned by the United States, including environmentally sensitive lands, pursuant to a right-of-way issued by the Bureau of Land Management ("BLM"). The project became operational with the first shipments of phosphate concentrate through the pipeline sometime after May of 1986.[1]

The state of Utah also owns phosphate deposits in Vernal within a reasonable proximity to the phosphate mine purchased by Chevron. Utah has leased some or all of its phosphate holdings in Vernal to Ashley Creek.[2] When

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[1]When Chevron purchased the Vernal phosphate mine it assumed an existing phosphate sales contract with Cominco, Ltd., a phosphate fertilizer producer in western Canada. Prior to the time the pipeline became operational, Chevron supplied Cominco by trucking phosphate to a railhead near Park City, Utah. In 1988, Cominco cancelled its phosphate contract with Chevron, concluding that it could obtain all the phosphate it needed at a lower cost from its own mining operations. Neither Chevron nor its successor-in-interest, SF, ever sold phosphate concentrate to a third-party after 1988, despite repeatedly trying to find outsider purchasers. During the entire time Chevron owned and operated the pipeline, no additional phosphate mines were developed in the United States and, after 1988, there were no third-party phosphate sales from a western United States phosphate mine. In 1992, Chevron completely exited the business by selling its interest in the entire integrated fertilizer project to SF for $64 million, only half of what it paid for the Vernal mine alone.

[2]As set out more fully below, Ashley Creek has no employees, no credit history, and no assets other than these undeveloped phosphate leases. John Archer, Ashley Creek's sole shareholder, pays, on behalf of Ashley Creek, $11,000 per year for the leases.

Ashley Creek learned that Chevron intended to construct a pipeline to transport phosphate from Vernal to Rock Springs, it approached Chevron about the possibility of constructing the pipeline as a joint venture. In fact, Ashley Creek requested tat the BLM condition the granting of any right-of-way "upon requirements that operators of nearby properties which may be benefitted by a pipeline be given reasonable opportunity to participate in the line upon payment of an appropriate share of expenses." The BLM denied this request on the grounds that it understood the proposed pipeline would be subject to the jurisdiction of the Interstate Commerce Commission ("ICC") and that Ashley Creek would be able to ship its phosphate through the pipeline under tariffs set by the ICC.

In November of 1986, Ashley Creek approached Chevron requesting rate information for the shipment of phosphate slurry through the pipeline. Although Chevron provided Ashley Creek with preliminary rate estimates, it refused to publish a tariff. In response, Ashley Creek filed a complaint with the ICC alleging that Chevron was a common carrier by pipeline unlawfully operating without a tariff. In a decision issued in 1989, the ICC determined that Chevron was a common carrier and ordered it to establish rates and file a tariff for the transportation of phosphate slurry through the pipeline. *Ashley Creek Phosphate Co. v. Chevron Pipe Line Co.*, 5 I.C.C.2d 303 (1989).

In response to the order, Chevron published a tariff. On June 19, 1989, the day before the tariff became effective, Ashley Creek and Utah filed suit against Chevron, asserting that Chevron's actions with regard to the pipeline violated the antitrust laws of the United States. Shortly

thereafter, the ICC, Ashley Creek, Utah, and Chevron all agreed and stipulated as follows: "[t]he determination of whether the rates which [Chevron has] established in its tariff for transporting phosphate through the Chevron slurry pipeline from Vernal, Utah, to Rock Springs, Wyoming, are unjust, discriminatory or unreasonable, is hereby referred to the [ICC]." The district court stayed resolution of Ashley Creek's and Utah's antitrust claims against Chevron pending the resolution of the issues referred to the ICC.

For the next seven years, the reasonableness of the published tariffs on the phosphate pipeline was litigated before the ICC and its successor agency, the Surface Transportation Board ("STB").[3] While the matter was pending before the ICC, Chevron published a revised tariff in August of 1991 and a second revised tariff in February of 1992. Each revised tariff reduced the rates of the prior tariff. In April of 1992, Chevron sold its entire integrated phosphate fertilizer project to SF. SF immediately adopted the Chevron tariff then in effect. In response to this transaction, Ashley Creek filed a complaint with the ICC naming SF as a defendant and repeating the allegations regarding the pipeline set out in its original ICC filing. The ICC consolidated the two complaints and indicated that it would apply the identical ratemaking methodology in both cases.

In October of 1996, the STB issued a decision on Ashley Creek's consolidated administrative complaints (the

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[3]The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995), abolished the ICC and transferred certain functions and pre-existing proceedings to the STB effective January 1, 1996.

"1996 Order"). *Ashley Creek Phosphate Co. v. Chevron Pipe Line Co.*, Nos. 40131, 40810, 1996 WL 625471 (S.T.B. 1996). The STB found that the published tariffs were "unreasonable for shipments at many volume levels." *Id.* at ¯19. It nevertheless concluded that "there may be certain shipping patterns where the tariff rate structure would be reasonable," and ultimately summarized its decision as follows:

> On the record developed in this proceeding, we are unable to determine the size of the phosphate market, nor can we evaluate whether Ashley Creek[] has the ability to serve that market. Rather, it is for the court in the underlying antitrust action to determine whether Ashley Creek was ever in a position to market phosphate, or will be in the future, and to determine the size of the potential market for phosphate that could be delivered by this pipeline. It may be that the court will conclude that one of our other volume usage scenarios[4] – or, indeed, a scenario that we did not even consider at all – is more useful for purposes of the antitrust litigation. Our role is simply to assist the court by presenting a framework for addressing the narrow issue that is the subject to our primary jurisdiction. We find:

Defendants' subject tariffs covering the transportation of phosphate slurry from Vernal, UT to Rock Springs, WY,

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[4]Appended to the 1996 Order were several tables evaluating the reasonableness of the tariffs at different volumes of phosphate shipped through the pipeline.

are unreasonable to the extent discussed in this decision.

*Id.* (footnote omitted).[5]

After the STB issued the 1996 Order, the district court granted Ashley Creek permission to file an amended complaint alleging antitrust claims against SF. The district court further indicated that the stay it had previously entered pending the STB's resolution had expired as a result of the issuance of the 1996 Order. Utah declined to join Ashley Creek's amended complaint to the extent it stated claims against SF; instead, SF and Utah entered into an agreement whereby SF guaranteed that the tariff then in effect would not be raised.[6]

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[5]The parties vigorously contested before the district court, and continue to contest on appeal, whether the 1996 Order definitively concluded that the published tariffs were unreasonable or, instead, merely provided a framework for analyzing the reasonableness of the tariffs for the district court to apply. The district court concluded that the 1996 Order merely set out an analytical framework to be applied by it and that the necessary analysis "hinge[d] on the resolution of substantial factual questions." Utilizing a new tariff published by SF in 1999, along with the tree previously published tariffs utilized by the STB in conducting its analysis, the district court ultimately concluded that the tariffs were reasonable. In light of this court's affirmance *infra* of the district court's conclusion that Ashley Creek lacks standing to bring its antitrust claims, we need not address the propriety of the district court's alternative ruling that the published tariffs were reasonable.

[6]In 1999, SF published a new tariff, the fourth tariff to be published since 1989. The fourth tariff recovers only operating and new capital costs, not original capital costs. Although this fourth tariff played a key role in the district court's decision that the published tariffs on the pipeline were reasonable, this court need not reach the issue.

*B. District Court Order*

After the STB issued its 1996 Order and the district court indicated that its previously imposed stay had expired, SF filed a motion for summary judgment. In its motion, SF asserted that it was entitled to summary judgment on two independent bases: (1) Ashley Creek failed to demonstrate that it had standing to bring its antitrust claims; and (2) its tariff for the use of the pipeline was not exclusionary. The district court granted the motion, ruling in favor of SF on each of the independent bases advanced in its motion.

The district court began by noting that to have standing to bring antitrust claims, Ashley Creek must demonstrate: (1) it has an antitrust injury to either its business or its property; and (2) there is a direct causal connection between that injury and the alleged violation of antitrust laws. *See SportsRacing Serv. Inc. v. Sports Car Club of Am., Inc.*, 131 F.3d 874, 882 (10th Cir. 1997). Ashley Creek asserted both injury to its business (exclusionary tariffs prevented it from entering the phosphate concentrate and phosphate fertilizer industries) and injury to its property (those same exclusionary tariffs impaired the value of its mineral leases). Nevertheless, because Ashley Creek had never been in the business of selling phosphate concentrate or producing and selling phosphate fertilizer, the district court concluded that Ashley Creek could not demonstrate an "antitrust injury" to its business unless it could demonstrate that it "manifested an intention to enter" the market **and** "a preparedness to do so". *Curtis v. Campbell-Taggert, Inc.*, 687 F.2d 336, 338

(10th Cir. 1982). With these standards in mind, the district court concluded that Ashley Creek failed to demonstrate either an antitrust injury or a causal nexus between the alleged antitrust injury and the alleged antitrust violation.

As to the antitrust-injury prong of the standing requirement, the district court assumed, without deciding, that Ashley Creek manifested an intention to enter the relevant markets; it concluded, however, that Ashley Creek failed to demonstrate preparedness to enter the market. In summary, the district court determined that: (1) Ashley Creek had failed to determine whether there is a market for phosphate and the price Ashley Creek would have to charge to cover its costs if the pipeline tariff were zero; (2) Ashley Creek had not even come close to taking the affirmative steps necessary to obtain financing of a capital intensive venture; and (3) Ashley Creek did not have any background or experience in mining, milling, or selling phosphate or phosphate fertilizer. The district court specifically rejected Ashley Creek's claim that SF's allegedly excessive tariffs excused it from taking steps to enter the market. The district court noted that there were numerous steps necessary for market entry that were completely unrelated to the cost of shipping phosphate from vernal to Rock Springs. For these exact same reasons, the district court also concluded that Ashley Creek had failed to satisfy the causal-nexus prong of the standing requirement.

The district court likewise rejected Ashley Creek's claim that it had standing solely by virtue of its mineral leases. The district court noted that the mineral leases, for which Ashley Creek pays the sate of Utah approximately

$11,000 per year, were only a minor component in the development of a heavily capital-intensive industry. Because Ashley Creek had failed to establish its viability in the relevant markets, the district court concluded that it would be mere speculation to recognize the leasehold interest as being injured. In that regard, the district court noted that mineral leases only hold value if the minerals can be economically mined, milled, and sold; without showing that its leases could be developed economically, the district court concluded that Ashley Creek could only speculate on their value.

Although the district court concluded that Ashley Creek did not have standing to bring its antitrust claims, it nevertheless went on the analyze whether SF's tariffs were sufficiently unreasonable to be exclusionary under the essential facilities doctrine. *See generally City of Chanute v. Williams Natural Gas Co.*, 955 F.2d 641, 647-649 (10th Cir. 1992) (discussing essential facilities doctrine). Utilizing the framework set forth in the 1996 Order, the district court concluded that SF's tariffs were not unreasonable, when considered together and over the twenty-year life of the pipeline, because the tariffs actually resulted in a significant under-collection with regard to return on capital.

In light of the district court's grant of summary judgment to SF, Chevron filed a summary judgment motion contending that it was entitled to summary judgment on the same grounds. Ashley Creek did not contest that the district court's resolution of SF's summary judgment motion would also necessitate dismissal of its claims against Chevron. Instead, Ashley Creek argued that the

district court's order granting summary judgment to SF was wrongly decided. The district court therefor treated Ashley Creek's memorandum in opposition to Chevron's summary judgment motion as a motion for reconsideration. So construed, the district court denied the motion on the grounds that it was not supported by previously unavailable evidence or an intervening change in controlling law. *See* Fed. R. Civ. P. 59(e). The district court then granted Chevron summary judgment for the same reasons previously articulated in granting SF summary judgment.

## II. DISCUSSION

### *A. Standard of Review*

This court reviews a grant of summary judgment *de novo*, applying the same standard used by the district court under Fed. R. Civ. P. 56 ( c). *Sports Racing*, 131 F.3d at 882. Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed R. Civ. P. 56 ( c). Although this court has noted that in the broad sense summary judgment should be used sparingly in antitrust cases, "the usual rules governing summary judgment still apply." *Sports Racing*, 131 F.3d at 882; *see also Curtis*, 687 F.2d at 338 ("Summary procedures are to be used sparingly in anti-trust litigation. But where . . . the record clearly indicates that there are no circumstances under which plaintiff can prevail, summary procedures are appropriate to avoid needless trials and unnecessary expense."). "Moreover,

even in antitrust cases, we are not limited to the grounds upon which the trial court relied but may base summary judgment on any proper ground found in the record to permit conclusions of law." *Sports Racing*, 131 F.3d at 882 (quotation and alteration omitted). The district court's ruling that Ashley Creek lacked standing under Section 4 of the Clayton Act, 15 U.S.C. § 15, is a question of law subject to *de novo* review. Id.

*B. Analysis*

Section 4 of the Clayton Act confers on private parties the power to enforce federal antitrust laws. *See* 15 U.S.C. § 15(a) ("[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor [in the appropriate federal district court]."); *see also id.* § 12(a) (defining "antitrust laws"). Although Section 4 appears to be a broad grant of standing, "a plaintiff's right to sue for money damages is subject to a number of limitations unique to the antitrust laws that are based upon the express words of the statute and policies found by courts to be implicit in the structure and purpose of the antitrust laws." ABA Section of Antitrust Law, *Antitrust law Developments* 839 (5th ed. 2002); *see also id.* 839 n. 29 (collecting cases); *Reazin v. Blue Cross & Blue Shield of Kan.*, 899 F.2d 951, 962 n. 16 (10th Cir. 1990) ("We are also aware that the Supreme Court may be concerned about reading section 4 of the Clayton Act too broadly."). "To maintain standing to bring an antitrust claim under § 4 of the Clayton Act, 15 U.S.C. § 15, a plaintiff must show (1) an `antitrust injury'; and (2) a direct causal connection between that injury and a defendant's violation of the antitrust laws." *Sports Racing*,

131 F.3d at 882.

> To meet the first prong [a plaintiff] must allege a business or property injury, an antitrust injury, as defined by the Sherman Act. An antitrust injury is defined as an injury of the type the antitrust laws were intended to prevent and that flows from that which makes [the defendant's] acts unlawful. A violation of the Act without resultant injury to the [plaintiff] is insufficient to confer standing, [plaintiff] must show the antitrust injury resulted directly from [the defendant's]violation of antitrust law.

*City of Chanute*, 955 F.2d at 652 (citations and quotations omitted).

Ashley Creek claims that Chevron's and SF's allegedly exclusionary tariffs for the use of the phosphate slurry pipeline caused an antitrust injury to both Ashley Creek's business and property. An antitrust injury to *either* Ashley Creek's business *or* property would be sufficient to confer standing on Ashley Creek to raise the instant antitrust claims. *See* 15 U.S.C. § 15(a).

*1. Injury to Business*

Ashley Creek is not, and has never been, in the business of mining and selling phosphate concentrate.[7]

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[7]To the extent that Ashley Creek's appellate filings could be read to hint at an antitrust claim relating to its potential entry into the phosphate fertilizer market, we agree with the district court that there is absolutely no evidence in the record that Ashley Creek was ever

"However, most courts have not required a plaintiff to actually be engage in an ongoing business in order to have standing under the anti-trust laws. It is sufficient if he has manifested an intention to enter the business and has demonstrated his preparedness to do so." *Curtis*, 687 F.2d at 338 (quotation omitted); *see also* ABA Section of Antitrust Law, *Antitrust Law Developments* 842 & n.38 (5th ed. 2002) (collecting cases for following proposition: "[M]ost courts have held that injury to an enterprise in the planning stage is actionable, provided that the plaintiff has an intent and capability to enter the market and has achieved a sufficiently advanced state of preparation for doing so."). This court has identified the following as "key elements" in evaluating the plaintiff's preparedness to enter a business: (1) ability to finance the business and purchase the necessary facilities and equipment; (2) consummation of contracts needed for the proposed venture; (3) affirmative actions by the plaintiff to engage in the proposed business; and (4) the background and experience of the plaintiff in the prospective business. *Curtis*, 687 F.2d at 338. In examining preparedness, courts have uniformly

> drawn the line at the point where promotion transcends the level of hopes, desires, and expectations, and reaches a certain stage of maturity and concreteness, a stage where it is

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prepared to enter that market. Accordingly, this court, like the district court, restricts its analysis to Ashley Creek's claims regarding the phosphate concentrate market.

> accompanied by certain indicia of ultimate success. Put another way, the courts have held that a potential competitor cannot achieve standing merely by demonstrating his *intention* to enter a field; he must also demonstrate his *preparedness* to do so.

*Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 994 (D.C. Cir. 1977) (cited with approval in *Curtis*, 687 F.2d at 338).

In analyzing whether Ashley Creek could demonstrate standing under the standards set out by this court in *Curtis*, the district court began by assuming, without deciding, that Ashley Creek had manifested its intention to enter the phosphate concentrate market. The district court concluded, however, that Ashley Creek could not satisfy any of the key elements identified in *Curtis* for measuring preparedness to enter the phosphate concentrate market. In that regard, the district court noted that Ashley Creek's own estimates placed the cost of entering the phosphate concentrate market at something in excess of $67 million during the relevant time frame. The record revealed, however, that Ashley Creek had only a thousand dollars on hand and had done nothing to obtain financing. The record further revealed that Ashley Creek had completed only a limited "Type 1" feasibility study, and that a "Type 3" or "Type 4" study would be necessary to secure financing. In addition, the district court noted that Archer, Ashley Creek's sole shareholder, testified that to obtain financing Ashley Creek would need signed contracts with customers to purchase phosphate concentrate at a specified price. The record revealed, however, that Ashley Creek had never discussed price with any potential customer. The

district court noted that this was most likely because Ashley Creek's very preliminary feasibility study left it unable to project its own costs of production at anything less than a margin of error of plus or minus 25%. In fact, Ashley Creek did not know whether there were any customers who would buy concentrate at the price Ashley Creek would have to charge even if the tariff was zero. Finally, the district court noted that although Archer, the only then-current officer of Ashley Creek, did have experience in buying and selling phosphate reserves, he did not have any experience in mining and selling phosphate concentrate.

The district court likewise rejected Ashley Creek's assertion that it was not required to demonstrate any further preparatory steps to enter the phosphate concentrate market because the actions of Chevron and SF had rendered such steps futile. Although noting that not all courts had adopted such a futility exception and that this court had yet to decide the question, the district court nevertheless concluded that Ashley Creek failed to fall within the ambit of the rule. The district court pointed out that Ashley Creek's assertion that it could not conduct relevant feasibility studies because Chevron had refused to publish a tariff was not borne out by the record. In particular, at no time after Chevron published a tariff in 1989 did Ashley Creek take steps to determine whether it was economically feasible to sell phosphate under the 1989 tariff or any of the successively lower tariffs. This was true even after the State of Utah and SF entered into a settlement agreement guaranteeing that the tariff would not be raised and after SF published the fourth tariff which recovers only operating and new capital costs and no original capital costs. More importantly, the district court noted that even assuming

some or all of the first three tariffs were too high, Ashley Creek was not prevented from determining: (1) what price customers were willing to pay for phosphate concentrate, assuming there was actually a market for phosphate concentrate; (2) the freight cost to ship phosphate concentrate from the railhead in Rock Springs; or (3) its own production costs with sufficient precision to know the significance of a few dollars difference in the tariff. These factors, coupled with Archer's deposition testimony that Ashley Creek would not move forward with its project, regardless of the amount of the applicable tariff, without owning a 40% share of the pipeline, led the district court to conclude that a futility exception did not apply.

Although its brief before this court is less than clear, Ashley Creek appears to challenge both the district court's ruling that it lacked standing because it failed to demonstrate preparedness to enter the phosphate concentrate market and the district court's ruling that its lack of preparation is not excused by some futility exception to the preparedness doctrine. Neither of Ashley Creek's arguments are convincing.

This court can easily dispose of Ashley Creek's assertion that it was, in fact, prepared to enter the market during the relevant time frame. [8] Ashley Creek sets out the

[8]We note with some frustration that Ashley Creek completely fails to distinguish between the actions of Chevron and SF in asserting that it was prepared to enter the market for phosphate concentrate. Whether Ashley Creek was prepared to enter the market during the time Chevron controlled the pipeline is a distinct question from whether Ashley Creek was prepared to enter the market when SF was in control of the pipeline. Likewise, whether the actions of Chevron or SF rendered such preparation futile presents different questions.

following list of eleven steps that it took prior to the point Chevron refused to publish a tariff: (1) obtained the mineral leases; (2) hired a mining engineer to explore the leaseholds and test the ore and provide a preliminary assessment of the economic feasibility of producing phosphate concentrate; (3) obtained the promise of common carriage in the pipeline; (4) obtained a contract necessary for water[9]; (5) filed a mine plan and commenced acquisition of necessary permits; (6) commenced acquisition of an appropriate plot of land at Rock Springs[10];

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Ashley Creek never distinguished between the actions of Chevron and SF before the district court and does not do so on appeal. Nevertheless, our review of the entire appellate record leads this court to conclude that Ashley Creek was never prepared to enter the market during the entire time frame at issue.

[9]Although Ashley Creek asserts in its brief that it "obtained a contract" for water, it does not appear that such a contract was ever executed. Instead, the record demonstrates only that it engaged in negotiations with the Uintah Water Conservancy District and the Department of Interior regarding water supplies.

[10]In support of this assertion, Ashley Creek cites to 669 of SF's appendix. This citation is to the text of Ashley Creek's own memorandum in opposition to SF's motion for summary judgment. That memorandum does assert that Ashley creek began negotiations with the BLM to acquire an appropriate parcel of land in Rock Springs for drying and loading facilities. Nevertheless, the cited exhibits attached to the memorandum do not support the proposition. Instead, the referenced exhibits relate exclusively to negotiations between Ashley Creek, the Department of the Interior, and the Uintah Water Conservancy District regarding water supplies for a potential mining project. Accordingly, Ashley Creek has not directed this court to any record support for the assertion. We further note that Ashley Creek's consistent practice of citing to its own factual assertions in its various legal memoranda filed below, rather than citing to the relevant portions of the record supporting a given factual assertion has seriously delayed

(7) preliminarily designed a mining operation[11]; (8) preformed a preliminary feasibility study; (9) commenced initial negotiations with potential customers[12]; (10) inquiries regarding financing[13]; (11) formed a corporation

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the resolution of this appeal.

[11]It is far from clear how this supposed preparatory step is different from the fifth preparatory step identified by Ashley Creek as both are supported by the same ultimate citation to a Notice of Intention to Commence Mining Operations and Mining and Reclamation Plan, Form MR-1.

[12]In support of this assertion, Ashley Creek cites to three separate pages of its memorandum in opposition to SF's motion for summary judgment. Although the memorandum does use the term "customers," only one customer, Cominco, is identified and supported by a citation to record evidence.

[13]In support of this assertion, Ashley Creek cites to page 669 of SF's appendix, again a citation to Ashley Creek's memorandum in opposition to SF's motion for summary judgment rather than a citation to record evidence. The only relevant material on the referenced page is the following paragraph:

> Discussions with potential customers and regarding financing were necessarily preliminary and inconclusive. While a number of correspondents indicated interest if the pipeline were constructed and available at economic rates, in the absence of a reliable statement of pipeline transport costs, no estimate of Ashley Creek's potential price for phosphate customers FOB Rock Springs could be given potential customers allowing discussions to go further. Absent clear expressions of interest from potential customers, discussions of financing could not progress.

The assertions in Ashley Creek's memorandum regarding commencing inquiries as to financing are not supported by a citation to record evidence. Accordingly, Ashley Creek has once again directed this

to carry on the business. These very preliminary steps are insufficient to show preparedness to enter the market.

First, as noted by the district court, Ashley Creek had no financing commitment and was in no position to obtain financing. In particular, Ashley Creek has not cited to a single piece of record evidence indicating that it made even a preliminary inquiry regarding financing of a mining and milling operation, an operation which Ashley Creek itself estimated to cost in excess of $67 million. Even if it had made such contacts, Ashley Creek does not contest the district court's conclusion that the "Type 1" feasibility study conducted by Ashley Creek was completely insufficient for such purposes. Nor had Ashley Creek consummated any of the contracts necessary to operate a phosphate mine. The record citations provided by Ashley Creek on appeal show only that it engaged in negotiations regarding water supplies

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court to a portion of the voluminous record that does not support its factual assertions. Counsel is reminded that this court "will not search the record in an effort to determine whether there exists dormant evidence which might require submission of the case to a jury." *Gross v. Burggraf Constr. Co.*, 53 F.3d 1531, 1546 (10th Cir. 1995). Accordingly, Ashley Creek has provided no record support for the assertion that it made initial inquiries regarding financing.

to the proposed mine and that it discussed sales of phosphate concentrate with Cominco without ever discussing a price. Furthermore, although Ashley Creek notes that it commenced the application process for a mining permit, that is only one of the many permits necessary to develop and operate the mine, it points to no record evidence that it ever obtained the necessary permits. In fact, the record demonstrates that when Ashley Creek filed its mining plan and applied for a mining permit in March of 1986, the application was rejected on multiple grounds. Finally, it is clear that Ashley Creek did not have the necessary experience and background in the business of selling phosphate concentrate. Ashley Creek has never had any paid employees. Archer, the sole shareholder, pays all of Ashley Creek's bills and runs the corporation out of his house. Although Archer has been in the business of acquiring and selling mineral properties and reserves, neither he nor Ashley Creek has ever developed or operated a mine. For these reasons, we agree with the district court that Ashley Creek was not prepared to enter the market at the point when Chevron refused to publish a tariff. Furthermore, as set out at length in the district court's opinion, *Ashley Creek Phosphate Co. v. Chevron*, 129 F.Supp.2d 1299, 1304-05 (D. Utah 2000), Ashley Creek did not take any further, meaningful preparatory steps at any point after Chevron and SF filed a series of successively lower tariffs. Accordingly, the district court correctly concluded that Ashley Creek lacked standing under Section 4 of the Clayton Act for its injury to business claim, having failed to demonstrate that it was prepared to enter the market.

This court also agrees with the district court that

Ashley Creek's lack of preparation is not excused by a futility exception to the preparation requirement. As Ashley Creek quite correctly notes, several courts have recognized that in order to show preparation to enter a given market, an antitrust plaintiff need not take those steps which would have been rendered futile by an alleged monopolist. *See, e.g., Thompson v. Multi-List, Inc.*, 934 F.2d 1566, 1572 (11th Cir. 1991) ("[A] defendant cannot benefit by the application of the standing doctrine from the fact that it is able to prevent the plaintiff from becoming a [competitor].") *Fleer Corp. v. Topps Chewing Gum, Inc.*, 415 F. Supp. 176, 180 (E.D. Pa. 1976) ("It would be inconsistent with one purpose of the Clayton Act – to protect the business interests of the victims of monopolistic practices – to require an antitrust plaintiff to pay a courtroom entrance fee in the form of an expenditure of substantial resources in a clearly futile competitive gesture."). Although this court has not yet addressed the issue, we have no doubt that there exists some type of futility exception to the preparation requirement set out in *Curtis*. Whatever the parameters of such an exception, however, it clearly does not excuse Ashley Creek from performing the most basic preparatory steps to determine whether: (1) there was a market for phosphate concentrate and, if so, what price customers were willing to pay; (2) the exact nature of its reserves; and (3) its own costs from the railhead in Rock Springs, in order to determine whether it could profitably sell concentrate even if the tariff were set at zero. Without undertaking the basic preparatory steps to answer these questions, Ashley Creek has absolutely no basis for showing that its "business" was in any way damaged by the allegedly exclusionary tariffs or other factors. *See Ashley Creek*, 129 F. Supp. 2d at 1305 (quoting following from 1993 statements of David Aro,

Ashley Creek's consulting mining engineer: "I have felt for some time that the level of *legal effort* far exceeds the level of *technical data* that is essential to verifying the reserves and costs. Without `proven' reserves and `acceptable' costs, the legal arguments could be `hypothetical and meaningless'").

Ashley Creek's futility argument boils down to an assertion that a proposed market participant need take no further preparatory steps, even of the most basic and preliminary nature, after an asserted violation of the antitrust laws by the party in control of an essential facility. Such an approach would eviscerate the standing requirement, rendering it wholly dependent on the merits of the plaintiffs case. *See Gas Utilities Co. of Ala., Inc. v. S. Natural Gas Co.*, 825 F. Supp. 1551, 1573 (N.D. Ala. 1992) (holding that plaintiff could not use defendant's denial of access to a pipeline to create an inference of antitrust injury to business or property). Allowing an antitrust plaintiff to recover merely upon a showing of a violation of the act, without a demonstration of injury-in-fact, would conflict with this court's precedent. *See City of Chanute*, 955 F.2d at 652 ("A violation of the Act without resultant injury to [plaintiff] is insufficient to confer standing." (quotation omitted)). Furthermore, none of the cases cited by Ashley Creek support its assertion that this court should adopt such an expansive reading of the futility doctrine. In the very cases cited by Ashley Creek, the courts applied the four-factor preparedness test and analyzed whether the plaintiff had presented adequate evidence of concrete preparedness. *See,* e.g., *Thompson*, 934 F.2d at 1572 (applying preparedness requirement and finding standing when plaintiff was already an established

realtor in the market served by t he defendant board of realtors and multiple listing service); *Jayco Sys. V. Savin Bus. Mach. Corp.*, 777 F.2d 306, 314 (applying four-part test and finding standing only for injury to plaintiff's normal course of business, not to its proposed business expansion); *Hecht*, 570 F.2d at 994 (applying four-part test and noting that plaintiff's preparation must be at "a stage where it is accompanied by certain indicia of ultimate success").

For these reasons, in addition to those separate reasons set out by the district court,[14] we conclude that Ashley Creek's almost complete failure to prepare to enter the phosphate concentrate market is not excused by the futility doctrine.

*2. Injury to Property*

Ashley Creek also claims standing flowing from injury to its property, i.e., the mineral leases. It is uncontested that Ashley Creek's mineral leases constitute "property" for purposes of Section 4 of the Clayton Act. In rejecting Ashley Creek's assertion that it had standing to raise its antitrust claims solely by virtue of its mineral leases, the district court concluded as follows:

> The mineral leases (for which Archer or Ashley Creek now pays a little over $11,000 per year) is only one minor component in the development

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[14] *Ashley Creek*, 129 F. Supp. 2d at 1305-06; *see also supra* pp. 18-19 (discussing district court's analysis of Ashley Creek's futility claim).

> of a project that Ashley Creek admits would have cost $67 million in capital in 1990. Because Ashley Creek has not established the necessary steps to show its viability in that market, it would be too speculative and remote to recognize the leasehold interest as being injured. The mineral leases only hold value if the minerals can be economically mined, milled, and sold. Without showing that its leases could be developed economically, Ashley Creek can only speculate on the leases' value.

*Ashley Creek*, 129 F. Supp. 2d at 1307. On appeal, Ashley Creek asserts that the district court erred in applying the preparation rule from *Curtis* to its claim of injury to property. Instead, Ashley Creek posits that its "leases represent a value protected by Section 4 of the Clayton Action without more." Appellant's Br. at 25. In support of this assertion, Ashley Creek relies on a 1964 district court decision in *Waldron v. British Petrol. Co.*, 231 F. Supp. 72 (S.D.N.Y. 1964).

We reject Ashley Creek's assertion that possession of property alone confers standing. The language of the Clayton Act makes clear t hat it is the injury to property, rather than its mere possession, that confers standing. *See* 15 U.S.C. § 15(a) ([A]ny person who shall be injured in his . . . property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . ."). In this case, there is no evidence that Chevron or SF clouded Ashley Creek's title to the leases. Nor is there any evidence that the leases were less valuable after the supposedly anti-competitive acts than they were before those

acts.[15] In fact, there is not a single citation to the record in that section of Ashley Creek's brief relating to its claim of injury to property. In reality, Ashley Creek's claimed injury relates to a proposed business – a phosphate concentrate supply business that would have used the mineral leases. To

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[15]The history of these particular mineral leases reveal multiple failed attempts to develop the phosphate deposits. Archer first acquired the leases from Utah in 1963; he immediately sold the leases to Mountain Fuel Supply Company. Mountain Fuel failed to develop a mine and, instead, allowed the leases to lapse. Archer reacquired the leases in 1974 and assigned them to Utah International in 1975. Utah International also failed to develop a mine, after determining that development was not feasible at then-current and projected phosphate prices. After the leases were re-assigned to Archer in 1984, he attempted to sell them to Chevron and Cominco. Both companies indicated that they were not interested. In 1997, Archer approached Agrium about its interest in investing in the leases. Agrium declined the invitation. Accordingly, the record reveals that every company Ashley Creek approached has failed to decline to develop the leases.

have standing to allege injury to an inchoate business interest, Ashley Creek must establish its preparedness to enter the market. As set out at length above, however, Ashley Creek has utterly failed to demonstrate that it was prepared to develop the mineral leases. In these narrow circumstances[16], this court concludes that the district court properly considered Ashley Creek's lack of preparedness to enter the phosphate concentrate market in analyzing whether Ashley Creek and demonstrated an injury to its mineral leases.

The district court opinion in *Waldron* is not to the contrary. In *Waldron*, the plaintiff had a "highly desired contract" with the Iranian Oil Company to purchase oil. 231 F. Supp. at 78. The plaintiff alleged a conspiracy among the defendant major oil companies to refuse to purchase either oil or the contract from the plaintiff. *See id.* at 79-81, 86-87. The court held that although the plaintiff could not claim standing based on injury to his business because he was not prepared to enter the business of selling oil, he did have standing based on injury to his property in the form of the contract itself. *See id.* at 87. In contrast, the record in this case is completely devoid of evidence relating to the value of the leases during the relevant times periods. Accordingly, Ashley Creek has simply not put forward even a scintilla of evidence to demonstrate that it suffered any harm to its property at the hands of Chevron and SF.

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[16]That is, when the plaintiff's claimed injury to property flows from its claim that it would have used the property as part of an anticipated business venture.

## III. Conclusion

For those reasons set out above, this court concludes that Ashley Creek has failed to adduce evidence from which a trier of fact could conclude that it has suffered an antitrust injury to either its business or property. We therefore **affirm** the district court's dismissal of Ashley Creek's antitrust claims for lack of standing. Our conclusion that Ashley Creek lacks standing to assert its antitrust claims obviates the need to address the district court's alternative conclusion that tariffs charged by Chevron and SF were reasonable. This court offers no opinion on that question.

## Appeal No. 014066

Pages 33-49 of the original text concern an appeal regarding state law counterclaims. They are unrelated to this petition.

## CONCLUSION

For those reasons set out above, the United States District Court for the district of Utah is hereby **AFFIRMED** in Nos. 01-4017 and 01-4031. In No. 01-4066, the appeal is **DISMISSED** in part, the district court is **REVERSED** in part, and the matter is **REMANDED** to the district court for further proceedings consistent with this opinion. All other outstanding motions are hereby **DENIED**.

# TAB 2

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

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ASHLEY CREEK PHOSPHATE COMPANY,

Plaintiff-Counter-Defendant-Appellant,

and

STATE OF UTAH,

Plaintiff-Counter-Defendant,

v.

CHEVRON USA, INC. et al.,

Defendants-Counter-Claimants-Appellees.

No. 01-4017

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ASHLEY CREEK PHOSPHATE COMPANY,

Plaintiff-Counter-Defendant,

and

STATE OF UTAH,

No. 01-4031

Plaintiff-Counter-
Defendant-Appellant,

v.

CHEVRON USA, INC. et al.,

Defendants-Counter-
Claimants-Appellees.

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ORDER
Filed January 22, 2003

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Before **KELLY, BRORBY,** and **MURPHY,** Circuit Judges.

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Ashley Creek Phosphate Company's petition for rehearing is denied.

Entered for the Court
PATRICK FISHER, Clerk of the Court

by: /s/
Deputy Clerk

(3)

Supreme Court, U.S.
FILED

02 1758 APR 21 2003

OFFICE OF THE CLERK

No.

In the

# Supreme Court of the United States

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ASHLEY CREEK PHOSPHATE CO.
&
STATE OF UTAH
*Petitioners,*

*v.*

CHEVRON USA, INC. et al.
*Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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## SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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E. Craig Smay
*Counsel of Record*
c/o E. Craig Smay, P.C.
174 E. South Temple
Salt Lake City, UT 84111
(801) 539-8515
*Attorney for Petitioner.*

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| TAB 5 | STB Decision Decided October 28, 1996 No. 40131 (Sub-No. 1) *et al.* |

# TAB 3

**ASHLEY CREEK PHOSPHATE CO.**
**a Utah Corporation, Plaintiff,**

**v.**

**CHEVRON et al., Defendants.**

**No. 2:89CV554.**

United States District Court,
D. Utah,
Central Division.

July 14, 2000.

Mineral lessee sued pipeline owner, alleging that tariff rate was exclusionary under essential facilities doctrine. On owner's motion for summary judgment, the District Court, Kimball, J., held that: (1) lessee lacked standing to assert antitrust claim, and (2) Federal Land Policy and Management Act (FLPMA) does not provide for private cause of action.

1. **Federal Civil Procedure 103.2**
Standing to assert claim is question of law to be decided by the court.

2. **Monopolies 28(1.4, 1.6)**
To have standing to bring antitrust claim, plaintiff must have suffered antitrust injury and there must be direct causal connection between that injury and alleged violation of antitrust laws. Clayton Act, §4, 15 U.S.C.A. § 15.

3. **Monopolies 28(1.4)**

To have "antitrust injury," and hence standing, plaintiff not already in allegedly injured market must have both manifested intention to enter market and demonstrated preparedness to do so. Clayton Act, §4, 15 U.S.C.A. § 15.

4. **Monopolies 28(1.6)**

Factors court considers in evaluating antitrust plaintiff's preparedness to enter allegedly injured market, and hence its standing to sue for alleged antitrust violation, are: (1) ability to finance, (2) consummation of contracts, (3) affirmative action to enter market, and (4) background and experience in particular business. Clayton Act, §4, 15 U.S.C.A. § 15.

5. **Monopolies 28(1.6)**

Mining interest lessee was not prepared to enter phosphate concentrate or phosphate fertilizer markets, and thus lacked standing to challenge pipeline owner's allegedly exclusionary tariff; lessee lacked financing, had not taken basic affirmative steps needed to enter relevant markets, and lacked background and experience necessary to enter them. Clayton Act, §4, 15 U.S.C.A. § 15.

6. **Monopolies 28(1.6)**

Mining interest lessee lacked standing to challenge pipeline owner's allegedly exclusionary tariff rate absent showing that tariff was preventing it from entering phosphate concentrate or phosphate fertilizer markets; lessee was unable to show that it could profitable sell concentrate or fertilizer at any tariff rate. Clayton Act, §4, 15 U.S.C.A. § 15.

**7. Monopolies 28(1.6)**

Mining interest lessee lacked standing to challenge pipeline owner's allegedly exclusionary tariff rate, even if rate reduced value of its mineral leases, absent evidence that lessee was prepared to enter mining business. Clayton Act, §4, 15 U.S.C.A. § 15.

**8. Monopolies 28(1.2)**

Private antitrust action cannot be maintained based upon lawful rate filed with Surface Transportation Board (STB). Sherman Act, § 1 et seq., as amended, 15 U.S.C.A. § 1 et seq.

**9. Monopolies 17(2.2)**

Pipeline owner's tariff rate was not exclusionary under essential facilities doctrine where, even including predecessor's rate overcharge prior to lessee's projected use of pipeline and most favorable scenario for mineral lessee's future utilization of pipeline, application of current tariff would result in net undercharge over life of pipeline. Sherman Act, §1, as amended, 15 U.S.C.A. § 1.

**10. Action 3**

Federal Land Policy and Management Act (FLPMA) does not provide for a private cause of action. Federal Land Policy and Management Act of 1976, § 102 et seq., 43 U.S.C.A. § 1701 et seq.

**11. Federal Courts 18**

Pendant state law claims should be dismissed if federal claims are dismissed before trial.

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Gary F. Bendinger, Richard W. Giauque, Bendinger Crockett Peterson & Casey, Salt Lake City, UT, Melvin Goldstein, Goldstein & Claxton PC, Washington, DC, Craig Smay, Salt Lake City, UT, William L. Miller, Goldstein & Assoc., Washington, DC, for Ashley Creek Phosphate Co.

Sandy J. Mooy, Public Service Commission, Salt Lake City, UT, Carol Clawson, Snell & Wilmer LLP, Salt Lake City, UT, Philip C. Pugsley, Utah Attorney General's Office, Salt Lake City, UT, Charlene Barlow, R. Wayne Klein, Utah Attorney General's Office, Salt Lake City, UT, for State of Utah.

Judith A. Albert, Thomas J. Stilling, Surface Transportation Board, Office Of The General Counsel, Washington, DC, for Surface Transportation Bd.

E. Scott Savage, Berman Gaufin Tomsic Savage & Campbell, Salt Lake City, UT, Robert A. Peterson, Bendinger Crockett Peterson & Casey, Salt Lake City, UT, for Chevron, USA, Inc.

William H. Adams, Young Adams & Hoffman LLP, Salt Lake City, UT, for SF Pipeline Ltd., SF Phosphates Ltd.

Peter W. Billings, Jr., Douglas B. Cannon, Fabian & Clendenin, Salt Lake City, UT, Lowry Snow, Snow & Jensen, St. George, UT, Wayne B. Slaughter, Jr., JR Simplot, Boise, ID, for J.R. Simplot Co., FS, Inc.

James S. Jardine, Jonathan A. Dibble, Cameron M. Hancock, Ray Quinney & Nebeker, Salt Lake City, UT,

Edmond S. Gross, Kansas City, MO, for Farmland Industries.

## AMENDED MEMORANDUM DECISION AND ORDER

KIMBALL, District Judge.

This matter is before the court on Defendants Farmland Industries, Inc., J.R. Simplot Company, SF Phosphates Limited Company, SF Pipeline Limited Company, and FS, Inc.'s (collectively the "SF Defendants") Motion for Summary Judgment. A hearing on that motion was held on June 14, 2000. At the hearing, the SF Defendants were represented by Peter W. Billings and James S. Jardine. Plaintiff Ashley Creek Phosphate Company ("Ashley Creek") was represented by E. Craig Smay. Before the hearing, the court considered carefully the memoranda and other materials submitted by the parties, including the Surface Transportation Board Decision, No 40131 (Sub-No. 1), dated October 28, 1996 (the "STB Decision") and the Memorandum Decision Addressing SF Defendants' Motion to Dismiss or, in the Alternative, Motion for Summary Judgment, issued by Judge David Sam on June 19, 1998 ("Judge Sam's Decision"). Since taking the matter under advisement, the court has further considered the law and the facts relating to this motion. Now being fully advised, the court renders the following Amended Memorandum Decision and Order.

## BACKGROUND

### A. BACKGROUND REGARDING THE CASE

This suit pertains to Ashley Creek's efforts to use a pipeline to carry phosphate, used primarily in the manufacture of phosphate fertilizer, from fields in Vernal to a rail junction in Rock Springs (the "Pipeline"). The fields in Vernal are presently owned by the SF Defendants-who purchased the fields from Chevron in 1992-and the State of Utah. In 1974, Ashley Creek purchased the right to mine the State's holdings.

Ashley Creek maintains that the Pipeline is the only way to transport phosphate from Vernal to a plant because: (1) easements for another pipeline will not be issued by the federal government due to the environmental sensitivity of the land, and (2) the State of Utah will no longer issue overweight trucking permits for transportation by truck due to the damage such trucking causes (which is the factor that led Chevron to construct the Pipeline in the first place).

The Pipeline was owned and controlled by Chevron at the time it began operating in 1986. Chevron obtained the rights-of-way necessary to construct the Pipeline by assuring various federal agencies that it would operate the line as a common carrier. However, once the Pipeline was built, Chevron refused to publish a tariff until it was ordered to do so in 1989 by the Interstate Commerce Commission ("ICC"), which was acting in response to a complaint filed by Ashley Creek.

Ashley Creek responded to the tariff by filing this antitrust lawsuit, alleging, among other things, that the tariff is outrageous and violates the essential facilities doctrine of Sections 1 and 2 of the Sherman Act. The reasonableness of Chevron's rates was referred to the ICC by the district court. On April 17, 1992, while the ICC proceeding was still pending, Chevron sold its Vernal phosphate fields, its Rock Springs plant, and the Pipeline to entities formed by J.R. Simplot Company and Farmland Industries, Inc.-the "SF Defendants". The SF Defendants continued the tariff and were joined as defendants.

In 1996, the Surface Transportation Board, ("STB") (successor to the ICC) issued a ruling, finding that the tariff was unreasonable at many volumes. Specifically, the STB ruling sets forth a formula that enables the SF Defendants, as the owners of the Pipeline, to recover the cost of constructing ($35 million) and operating the Pipeline, plus a reasonable rate of return. The formula allows the SF Defendants to recover the construction costs on a flat rate per ton, as opposed to an accelerated rate of depreciation, as the SF Defendants advocated, or a flat rate per year as Ashley Creek advocated. For this reason, it is impossible to determine whether the tariff "over-recovers" until the total volume of phosphate shipped during the life of the Pipeline is known or assumed. Once the total volume is known or assumed, the depreciation per ton can be determined and a calculation made of a specific amount recovered for each month, depending on that month's known or assumed volume. The STB applied the formula to two different hypothetical sets of volumes and concluded that the tariff

over-recovered, that is, was unreasonable, at many volumes.

After the STB issued its decision, the SF Defendants moved to dismiss Ashley Creek's lawsuit on the grounds that, assuming Ashley Creek shipped its projected quantities, there would be no over-recovery during the 14-year period that the SF Defendants owned the Pipeline. Judge Sam denied the motion, primarily on the ground that a 20-year period must be utilized.

The SF Defendants then established a new tariff (effective January 1, 1999), which they claim results in a net under-collection of $3.3 to $5.4 million over the Pipeline's 20-year life. The SF Defendants claim that the new tariff provides only for recovery of operating and fixed costs and does not recover the $35 million construction costs.

## B. BACKGROUND REGARDING THE PRESENT MOTION

The SF Defendants seek summary judgment on all of Ashley Creek's claims directed toward them.[1] First, they have moved for summary judgment on the Counts I through IX of the Second Amended Complaint (the antitrust claims) on two independent grounds. First, the SF Defendants claim that, as a matter of law, Ashley Creek does not have standing to bring antitrust claims for two reasons. The SF Defendants contend that Ashley Creek cannot show that it is prepared to enter any of the markets identified in the Second Amended Complaint. In

[1] The Chevron Defendants have not moved for summary judgment.

addition, the SF Defendants claim that Ashley Creek has admitted that the tariff in place during the SF Defendants' involvement with the Pipeline is not the reason for Ashley Creek's failure to develop its property. Thus, the SF Defendants argue that, as a matter of law, there is no causal nexus between the alleged violation and any alleged damage to business or property under the antitrust laws. As a second independent basis for summary judgment, the SF Defendants contend that the tariff charged by them is, as a matter of law, reasonable and cannot be the basis for exclusionary conduct.

The SF Defendants have also moved for summary judgment on Counts X and XII. Both of these claims are based on the SF Defendants' obligation under the Federal Land Policy and Management Act ("FLPMA"). According to the SF Defendants, the Tenth Circuit has recognized that no private cause of action exists under FLPMA for Ashley Creek, and there is no evidence that the tariff has affected any alleged easement by necessity in favor of Ashley Creek.

Finally, the SF Defendants have moved for summary judgment on Count XI, which is a state law nuisance claim. Because there is no diversity between Ashley Creek and the SF Defendants, and if the federal claims are dismissed, the SF Defendants claim that this state law claim should also be dismissed.

## STANDARD OF REVIEW

A motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure is appropriate when the pleadings depositions, and affidavits on file show that

there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The movant bears an initial burden to demonstrate an absence of evidence to support an essential element of the non-movant's case. If the movant carries this initial burden, the burden then shifts to the non-movant to make a showing sufficient to establish that there is a genuine issue of material fact regarding the existence of that element.[2] *See Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

The non-movant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). While the non-movant is entitled to the benefit of whatever reasonable inferences there are in its favor, the reasonableness of those inferences is scrutinized in light of the undisputed facts. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A genuine dispute exists only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505. "By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise

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[2] Ashley Creek did not refer the court to any material facts that it claims are in dispute; rather, it simply provided its own statement of undisputed facts, which does not comport with the requirement of DUCivR 56-1(b). Technically, under DUCivR 56-1(c), all of the SF Defendants' facts should be deemed admitted for purposes of summary judgment. However, the court in conducting its analysis, has made an attempt to evaluate whether Ashley Creek has created a genuine issue regarding any material facts.

properly supported motion for summary judgment; the requirement is that there is no *genuine* issue of *material* fact." *Anderson*, 477 U.S. at 247-48, 106 S.Ct. 2505 (emphasis in original).

## DISCUSSION

### 1. DOES ASHLEY CREEK HAVE STANDING TO BRING ANTITRUST CLAIMS?

Ashley Creek claims that the tariff on the Pipeline prevented Ashley Creek from entering both the market for phosphate concentrate and the market for phosphate fertilizer.[3] The SF Defendants claim that Ashley Creek does not have standing to bring such claims because Ashley Creek was not prepared to enter the relevant markets and because there is no causal nexus between the alleged antitrust violation and the alleged damage.

**[1-3]** The Tenth Circuit has repeatedly held that standing is a question of law to be decided by the court. *See, e.g., Curtis v. Campbell-Taggart, Inc.*, 687 F.2d 336, 338 (10th Cir.1982), *cert. denied*, 459 U.S. 1090, 103 S.Ct. 576, 74 L.Ed.2d 937 (1982); *Motive Parts Warehouse v. Facet Enter.*, 774 F.2d 380, 389 (10th Cir.1985). To have standing to bring such claims, Ashley

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[3] The SF Defendants point out that Ashley Creek also asserts a claim for antitrust violation in the "transportation of phosphate rock concentrate" market. The SF Defendants point out, and the court agrees, that there is absolutely no evidence that Ashley Creek was prepared to enter the phosphate fertilizer market or the transportation of phosphate market, assuming such a market exists. Thus, the bulk of the analysis pertains to the phosphate concentrate market.

Creek must satisfy a two-pronged test: it must have an antitrust injury, and there must be a direct and causal connection between that injury and the alleged violation of the antitrust laws. *See Sports Racing Serv. Inc. v. Sports Car Club of Amer., Inc.*, 131 F.3d 874, 882 (10th Cir.1997). Ashley Creek is not, and has never been, in the business of either (1) mining and selling phosphate concentrate or (2) manufacturing and selling phosphate fertilizer. Thus, to have an "antitrust injury," a plaintiff not already in the allegedly injured market must have both "manifested an intention to enter" *and* "demonstrated a preparedness to do so."[4] *See, e.g., Sports Racing Serv. Inc.*, 131 F.3d at 882; *Curtis*, 687 F.2d at 338.

[4] The Tenth Circuit, like other circuits, has identified four "key elements" in evaluating preparedness: (1) ability to finance, (2) consummation of contracts, (3) affirmative action to enter the market, and (4) background and experience in the particular business. *See Curtis*, 687 F.2d at 338; *Go-Video, Inc. v. Matsushita Elec. Indus. (In re Dual-Deck Video Cassette Recorder Antitrust Litigation)*, 11 F.3d 1460, 1465 (9th Cir.1993); *Martin v. Phillips Petroleum Co.*, 365 F.2d 629, 633-34 (5th Cir.1966), *cert. denied*, 385 U.S. 991, 87 S.Ct. 600, 17 L.Ed.2d 451 (1966). Courts have held that preparedness requires a showing of "concreteness" that demonstrates the ultimate success of the proposed business:

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[4] The court has assumed that Ashley Creek has manifested its intention to enter the relevant markets.

> Uniformly, the courts have drawn the line at the point where promotion transcends the level of hopes, desires, and expectations, and reaches a certain state of maturity and concreteness, a state where it is accompanied by certain indicia of ultimate success. Put another way, the courts have held that a potential competitor cannot achieve standing merely by demonstrating his intention to enter a field; he must also demonstrate his preparedness to do so.

*Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 994 (D.C.Cir.1997), *cert. denied*, 436 U.S. 956, 98 S.Ct. 3069, 57 L.Ed.2d 1121 (1978).

**1. Is Ashley Creek Prepared to Enter the Relevant Markets?**

**[5]** The testimony of John Archer ("Archer"), Ashley Creek's president and principal shareholder, as well as its mining engineer, shows that Ashley Creek not only fails all four tests, but it has failed to determine whether there is a market for phosphate rock concentrate at the price that Ashley Creek would have to charge to cover its costs.

Specifically, Ashley Creek itself estimates that the cost to enter the phosphate concentrate market was in excess of $67 million in 1992, and the cost to enter the phosphate fertilizer market was an additional $187 million. Archer testified that Ashley Creek has only a thousand dollars to its name and has done nothing to obtain financing. To obtain the necessary financing, Archer testified that Ashley Creek has conducted only a "Type 1" study. Archer also admitted that to obtain financing, Ashley Creek would also need signed contracts

with customers to purchase Ashley Creek's products at a specified price, but that Ashley Creek has never discussed price with any potential customer, let alone obtained a signed contract specifying the price.

Even more fundamental than a lack of financing, Ashley Creek has not taken the basic affirmative steps toward entering such capital intensive markets. With respect to the phosphate fertilizer market, all Ashley Creek has done is *consider* constructing a fertilizer plant, which is not enough.[5] As for the phosphate concentrate market, Ashley Creek has had only a "Type 1" feasibility study done, which describes how Ashley Creek would mine, mill, and ship phosphate. According to David Aro ("Aro"), the consulting mining engineer who prepared the study in 1985, a Type 1 feasibility study is very preliminary and "is seldom adequate for positive acceptance of a project." Based on this study, Ashley Creek knows what its own costs would be only within a margin of plus or minus 25%. Ashley Creek does not know the cost to ship its concentrate from the end of the pipeline to its potential customers. Ashley Creek does not know whether there are any customers who would buy concentrate at the price Ashley Creek would have to charge even if the Pipeline tariff were zero.[6] While Ashley Creek claims that the tariff is too high, it does not know whether it could profitably ship at the actual tariff rates or indeed at *any* tariff rate.

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[5] Moreover, in 1987, Archer testified under oath in an ICC proceeding that Ashley Creek had no intention of entering the phosphate market.

[6] The SF Defendants contend that the experience of others actually in the market demonstrates that there is, in fact, no market for Vernal phosphate concentrate beyond what the currently operating fertilizer plant at Rock Springs can use.

Merely knowing that there are phosphate deposits on its leases is not sufficient to demonstrate that Ashley Creek is prepared to enter the market. *See Practice Perfect Inc. v. Hamilton County Pharm. Ass'n,* 732 F.Supp. 798, 803 (S.D.Ohio1989) (holding plaintiff's principals failed to identify a sufficient market for their services which was an essential element for the success of their proposed business); *Gas Utilities Co. of Ala., Inc. v. Southern Natural Gas Co.*, 825 F.Supp. 1551, 1572 (N.D.Ala.1992), *aff'd*, 996 F.2d 282 (11thCir.1993) (finding that plaintiff lacked preparedness to enter market because *inter alia* "[t]here [was] no evidence of a plan whereby plaintiff could successfully undercut [defendant's] prices and have the financial ability to repay loans."). Even Aro, Ashley Creek's consulting mining engineer who prepared the Type 1 feasibility study, wrote the following notes in October 1993:

> I have felt for some time that the level of *legal effort* far exceeds the level of *technical data* that is essential to verifying the reserves and costs.
> Without "proven" reserves and "acceptable" costs, the legal arguments could be "hypothetical and meaningless."
> At the present time –
> 1-No proven reserves, only prob. and prosp.
> 2-No detailed estimate of acceptable capital costs and operating costs
> 3-No definition of metallurgy needed for conceptual plant design
> Pipeline tariff-only ONE of many cost facts-If in range of $3.00 to $4.00, no problem-other technical data acquisition can proceed!!

Ex. 59 to the Memorandum in Support of the SF Defendants' Motion for Summary Judgment ("SF Defendants' Memo in Support")(emphasis in original". Aro's concerns were valid.

Finally, the SF Defendants argue that Ashley Creek does not have the background or experience to enter the market for the mining, milling, and sale of phosphate concentrate. The court agrees. Archer, Ashley Creek's only officer has never had any experience in mining, milling, or selling phosphate concentrate. The other officers, Aro and Craig Smay, have resigned. Whatever experience Archer may have had in buying and selling phosphate *reserves*, that is not experience in mining and selling phosphate concentrate.

Ashley Creek contents that it need not have completed any step that would have been rendered useless by Defendants. Ashley Creek cites several cases for this proposition. For example, in *Thompson v. Multi-List, Inc.*, 934 F.2d 1566, 1572 (11th Cir. 1991), the court stated that:

> [A] defendant cannot benefit by the application of the standing doctrine from the fact that it is able to prevent the plaintiff from becoming a consumer of its product. As long as the plaintiff made a reasonable attempt to enter the market, . . . the plaintiff has standing to contest antitrust violations which create barriers to that market.

Similarly, in *Fleer Corp. v. Topps Chewing Gum, Inc.*, 415 F.Supp. 176, 179 (E.D.Pa.1976), the court held:

> We cannot find that [plaintiff's] steps toward entry were insubstantial if it is true that the taking of any

> further steps would have been a sheer waste of resources. It would be inconsistent with one purpose of the Clayton Act-to protect the business interests of victims of monopolistic practices-to require an antitrust plaintiff to pay a courtroom entrance fee in the form of an expenditure of substantial resources in a clearly futile competitive gesture.

Ashley Creek claims that any further steps that it might have taken would have been futile.

Even assuming that is a correct statement of the law,[7] Ashley Creek does not meet the factual predicate. Ashley Creek claims that defendants withheld information that prevented Ashley Creek from obtaining financing. However, the only information that was allegedly withheld was *Chevron's* delay in publishing a tariff. That is the conduct of Chevron, not the SF Defendants. Moreover, Chevron remedied whatever harm it caused by publishing a tariff in 1989. Even after Archer knew what the tariff would be, he testified that he did nothing to determine whether it was economically feasible to sell under the new $4.60 tariff. The margin of error (+/$9.00) for Ashley Creek's costs is greater than the entire third tariff of $4.60, let alone the margin by which Ashley Creek claims the tariff is unreasonable. In sum,

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[7] The tenth Circuit has not addressed the question but the Fifth Circuit has held the opposite. In *Jayco Sys., Inc. v. Savin Bus. Mach. Corp.*, 777 F.2d 306, 314 (5th Cir. 1985), the court held that it was "not dispositive" that the defendant would not have dealt with plaintiff *even* if the plaintiff had satisfied the four elements regarding preparedness. "Rather the question is whether, assuming Savin had been willing to supply Jayco with the necessary machines, Jayco would have been prepared to bid them."

Ashley Creek does not know "whether it could profitably sell phosphate concentrate" at the third tariff rate.

Even assuming the rate was too high, the SF Defendants did not prevent Ashley Creek from determining (1) what price customers would pay; (2) the freight costs to ship from Rock Springs; or (3) its own costs with sufficient precision to know whether a few dollars difference in the tariff would make any difference. Ashley Creek admits that it "has never done any analysis to determine whether the tariffs have in fact prevented Ashley Creek from selling its product or developing its project." Thus, Ashley Creek has failed to create a genuine dispute regarding whether the tariffs prevented it from preparing to enter the market. Furthermore, Archer's testimony confirms that the tariffs had very little, if anything, to do with Ashley Creek's failure to enter the market. Archer has testified that he will not go forward without owning 40% of the Pipeline, thus precluding Ashley Creek's claim that the tariff is an excuse for not proceeding with preparations for its project. Since March 1997 there has been a settlement agreement (the "SITLA Agreement") between the State of Utah and SF Pipeline that guarantees that the tariff will not be raised. Since January 1999, the fourth tariff recovers only operating and new capital costs and no original capital costs. Despite guaranteed access and a tariff that will never exceed operating costs, Ashley Creek has still not prepared to enter the market.

Thus, the court finds that Ashley Creek was not and is not prepared to enter any of the relevant markets, and its antitrust claims are dismissed on that basis.

**2. Is There a Nexus Between the Alleged Injury and Alleged Violation of Antitrust Laws?**

[6] Ashley Creek cannot satisfy the second prong of the standing requirement because its own admissions make it impossible to show a causal nexus between the alleged violation (an unreasonable tariff) and the alleged injury (exclusion from the market). The same evidence discussed above demonstrates that there is no causal connection between the alleged violation and the alleged injury. First, Ashley Creek does not know (1) the amount by which the tariffs is unreasonable, (2) the price any customer would pay, (3) the freight from Rock Springs, or (4) at what tariff rate, if any, Ashley Creek could profitably ship and sell its concentrate. Moreover, Archer testified that whatever the tariff, he will not go forward with his project until he obtains an equity interest in the Pipeline. Thus, he has testified that the tariff did not make any difference.

Accordingly, the court finds that there is no causal nexus between the alleged violation and the alleged injury, and Ashley Creek's antitrust claims are dismissed on that basis.

**C. Does Ashley Creek Have Standing Based on Alleged Injury to Its Leases.**

[7] Ashley Creek argues that it has standing because this court has already determined that injury to Ashley Creek's property-its leases-confers standing without regard to injury to business. Section 4 of the Clayton Act provides standing to anyone "injured in their business or property by reason of anything forbidden in the antitrust laws." Ashley Creek argues that "Defendants' failure to provide plaintiff's leaseholds with the access to market to which they were statutorily entitled

decreased the value of the leaseholds, and that, as a result, plaintiff has standing to assert the injury to its property."

In Judge Sam's Decision, he did not rule that Ashley Creek has standing on this basis. In a previous motion to dismiss, the SF Defendants argued that Ashley Creek did not have standing to complain about a conspiracy to raise prices for phosphate concentrate since Ashley Creek was not intending to be a buyer but a seller of concentrate. The SF Defendants did not raise, and Judge Sam did not address, the issue of whether Ashley Creek was prepared to enter the market.

The court disagrees that Ashley Creek has standing solely by virtue of its mineral leases. The mineral leases (for which Archer or Ashley Creek now pays a little over $11,000 per year) is only one minor component in the development of a project that Ashley Creek admits would have cost $67 million in capital in 1990. Because Ashley Creek has not established the necessary steps to show its viability in that market, it would be too speculative and remote to recognize the leasehold interest as being injured. The mineral leases only hold value if the minerals can be economically mined, milled, and sold. Without showing that its leases could be developed economically, Ashley Creek can only speculate on the leases' value. Accordingly, Ashley Creek does not have standing to bring antitrust claims on the basis of an alleged injury to its leases.

## II. ARE THE SF TARIFFS REASONABLE AND NON-EXCLUSIONARY?

Ashley Creek has claimed that the tariffs for the Pipeline were not reasonable and that the SF Defendants' claim that their fourth rate retroactively makes the other tariffs reasonable is unsupported by any authority. It also argues that a

retroactively reasonable rate is irrelevant to antitrust liability. In contrast, the SF Defendants argue that based on Ashley Creek's "best case" start date of 1989 and the fourth tariff implemented effective January 1, 1999 (which will not be increased during the relevant period except to recover increased operating costs or capital costs), the court cannot rule that the tariffs were exclusionary. The SF Defendants contend that this is another independent basis on which the court can find that Ashley Creek has no standing to bring antitrust claims. The SF Defendants argue, and the court agrees, that using the most current data available to determine if the tariffs are reasonable is precisely the approach adopted by the STB and is consistent with the stand alone cost ("SAC") method of evaluating rates.

The SF Defendants adopted the same third tariff that had been in place since February 28, 1992. Assuming Ashley Creek shipped its claimed volume of 1.085 million tons per year in addition to what SF was shipping the tariff generally would have been $4.60 per ton. Effective January 1, 1999, the SF Defendants adopted a fourth and still lower tariff, which collects only variable and fixed costs and provides no recovery for original construction costs or the cost of capital. Assuming Ashley Creek shipped its claimed volume of 1.085 million tons per year in addition to what SF was shipping, the tariff generally would have been approximately $2.15 for 1999.

**[8, 9]** The court has already ruled (1) that the STB did not hold that the SF Defendants tariffs were unreasonable, and (2) unreasonable does not necessarily mean exclusionary. As explained below, the court finds that the SF Defendants' tariffs were not unreasonable, and thus, they were not exclusionary. First, the United States Supreme Court has long held that a private antitrust action cannot be maintained based upon a

lawful rate filed with the ICC (now the STB). *Keogh v. Chicago & N.W.R. Co.*, 260 U.S. 156, 162-65, 43 S.Ct. 47, 67 L.Ed. 183 (1922); *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 106 S.Ct. 1922, 90 L.Ed.2d 413 (1986); *see* also *Pinney Dock & Transp. Co. v. Penn Cent. Corp.*, 838 F.2d 1445 (6th Cir. 1988). Thus, if the SF Defendants' rates were reasonable under the methodology employed by the STB, then as a matter of law, Ashley Creek has not been denied access to the Pipeline. Relying on the diskettes provided by the STB, which the STB used to compute the over- and under-collections under the formula used in its October 1996 decision, the SF Defendants have demonstrated that the two tariffs published by SF are reasonable under the STB's methodology. Moreover, they have demonstrated that even if the Chevron tariffs are included in the calculation, the tariffs are reasonable, and, as a matter of law, not a severe handicap.

In its October 1996 decision, the STB held that the tariffs were reasonable if the hypothetical stand-alone pipeline charging the same rates would have collected less than its costs, including recovery of construction costs and its cost of capital. (STB Decision at 39, attached as Attachment D to the SF Defendants' Supporting Memorandum). The STB's methodology provides for recovery of the construction costs on a "level rate per ton in real terms." (*Id.* At 30.) As a result, depreciation cannot be known until the total number of tons shipped is known or assumed and until the "time pattern" of that volume is known or assumed. The volume and the "time pattern" of that volume is thus critical in measuring reasonableness. A heavily disputed issue before the STB was whether there was a market for phosphate concentrate beyond the usage of the Chevron/SF fertilizer plant in Rock Springs. The STB did not decide that issue, saying that it was for the

court to determine whether Ashley Creek was ever in a position to market phosphate, or will be in the future, and to determine the size of the potential market for phosphate that could be delivered by the Pipeline. (*Id.* at 41.) The STB did, however, consider two different volume scenarios at the extremes. The first scenario, advocated by the SF Defendants, assumed that the market for phosphate concentrate milled in Vernal was limited to what the Chevron/SF fertilizer plant in Rock Springs could use. Under that scenario, there was no additional market demand and if Ashley Creek ever shipped on the Pipeline, its product would simply replace that otherwise shipped from the Chevron/SF mine. The second scenario, advocated by Ashley Creek, assumed that there was a market beyond the demand of the fertilizer plant in Rock Springs. The STB said that it regarded this second scenario as "intuitively less compelling." (*Id.*)

The SF Defendants have demonstrated that under the actual Chevron and SF volumes to October 31, 1999, and the most recent projected future volumes of SF, there is a net under-collection of $4,158,000 during the 20-year period 1986-2006 when the revenues collected under all four tariffs are considered. The STB ruled that Chevron should have published a tariff on November 25, 1986, and it therefore used December 1, 1986 as the start date for measuring reasonableness. The earliest Ashley Creek would have been prepared to ship on the Pipeline was three years after publication of a "reasonable rate," or December 31, 1989.

Even assuming Ashley Creek's best case scenario-that Ashley Creek can profitably ship its proposed 1.085 million tons of slurry annually and sell it beyond Rock Springs-and even assuming that it is appropriate to charge the SF Defendants with over-collections during the Chevron period,

this best-case scenario still shows an under-collection over the entire 20 years of $436,000, even including both (a) the $16,176,000 over-collection during the Chevron period and (b) the $11,890,000 over-collection during the period Ashley Creek was not shipping. There would have been no over-collection during any year of the SF period and a total under-collection of $90,269,000 during the 17 years Ashley Creek was shipping.[8]

Moreover, before even an "unreasonable" rate can be exclusionary under the essential facilities doctrine, it must result in a "severe handicap" to competition. *City of Chanute v. Williams Natural Gas Co.*, 955 F.2d 641, 652 (10th Cir.1992), *cert. denied,* 506 U.S. 831, 113 S.Ct. 96, 121 L.Ed.2d 57 (1992) *overruled in part on other grounds, Systemcare Inc. v. Wang Lab. Corp.* 117 F.3d 1137 (10th Cir.1997). Here, because of a net under-collection, there is not even an unreasonable rate, let alone a "severe handicap."

This is particularly true when the only reason the net collections are even close to a net over-collection is because of the significant over-collections during the first three years under the Chevron tariff when Ashley creek admitted it would not be shipping. That is, during the time only Chevron would have been shipping, the cumulative over-charge was $11,890,000 which Chevron paid to itself. During the period that Ashley Creek would have been shipping, there was no over-charge. In fact, there was an under-collection of $12,326,000.

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[8] Ashley Creek has not disputed that using updated volumes and revenues and an Ashley Creek start date of December 1989, there is a net under-collection over the STB's 20-year model, even if the over-collections during the Chevron period are charged to the SF Defendants.

The SF Defendants point out that Ashley Creek has changed its position by now arguing that the fourth tariff cannot be used to determine if the tariffs are unreasonable. Ashley Creek previously argued that updated information should be included in determining whether the tariffs are reasonable. The SF Defendants correctly argue that Ashley Creek cannot have it both ways. Either all four tariffs must be viewed together in the 20-year model, in which case they result in an under-collection and are reasonable. Or, each tariff must be analyzed for its own reasonableness, an analysis that the STB did not do for any of the three tariffs but which would demonstrate that both the third and the fourth tariffs were reasonable while they were in effect.

Finally, as discussed above regarding standing, Ashley Creek does not know its costs to produce any better than a margin of plus or minus 25%. In 1992, Ashley Creek estimated its costs to be $36.11 per ton with a margin of error ranging from $27.08 to $45.13. Even if the best case scenario showed a net over-collection, such an over-collection can hardly be a severe handicap to entry into the market when the entrant's own costs could vary by 25%. That is, the margin of error in Ashley Creek's cost estimates (plus or minus $9.00 per ton) far exceeds the *entire* tariff Ashley Creek would have been charged by SF Defendants (generally $4.60 under the third tariff and approximately $2.15 during the fourth tariff).

Accordingly, the court finds that the tariffs were reasonable under the STB methodology, and therefore, as a matter of law, did not deny Ashley Creek access to the Pipeline. In addition, the court finds that the reasonable tariff was not discriminatory. Thus, there is no antitrust liability on the part of the SF Defendants based on its tariffs.

## III. SHOULD ASHLEY CREEK'S COUNTS X AND XII BE DISMISSED?

[10] In Count XII, Ashley Creek claims that Chevron and the SF Defendants violated their obligations under FLPMA, Specifically, Ashley Creek asserts that the federal right-of-way permit granted for the pipeline requires SF Pipeline to grant Ashley Creek access on a "non discriminatory and reasonable" basis. The Tenth Circuit has expressly held that the FLPMA does not provide for a private cause of action. *State of Utah v. Babbitt*, 137 F.3d 1193, 1203 (10th Cir.1998). In addition, the SF Defendants claim that Count X, involving a "federal right of way," is premised on the same FLPMA claim and should be dismissed for the same reasons. They claim that Ashley Creek does not, and cannot, allege that the SF Defendants denied Ashley Creek physical access to the property or that Ashley Creek has been denied access to the Pipeline. Rather, Ashley Creek argues only that the tariff was too high. Ashley Creek cites no authority for the proposition that a common law right of an easement by implication can be converted and extended to a federal right to have the federal courts determine whether a common carrier tariff is too high. Moreover, Ashley Creek does not dispute the SF Defendants' argument that Ashley Creek's claim for a federal easement, which was asserted in 1998, is rendered moot by the 1997 SITLA agreement, which guarantees access at a rate that only covers fixed and variable costs-a rate lower than an owner would need to recover its investment.

For the reasons advanced by the SF Defendants, the court agrees that Counts X and XII of Ashley Creek's Second Amended Complaint should be dismissed.

## IV. SHOULD ASHLEY CREEK'S COUNT XI BASED ON STATE NUISANCE LAWS BE DISMISSED?

[11] The SF Defendants argue that Ashley Creek's claim based on state nuisance laws should be dismissed if the federal claims are dismissed. Pendent state law claims should be dismissed if the federal claims are dismissed before trial. *Bauchman v. West High School*, 132 F.3d 542, 549 (10th Cir.1997)("[I]f federal claims are dismissed before trial, leaving only issues of state law, the federal court should decline the exercise of jurisdiction by dismissing the case without prejudice") (quotations and citations omitted). This court agrees that Count XI of Ashley Creek's Second Amended Complaint should be dismissed without prejudice.

## CONCLUSION

For the reasons set forth above, the SF Defendants' Motion for Summary Judgment is **GRANTED** and Counts I-X and XII are **DISMISSED** with prejudice, and Count XI is **DISMISSED** without prejudice. The previous Order in this case, dated June 27, 2000, is **VACATED**.

This Amended Order will be filed under seal for 30 days from the date on which it is entered, at which time it will become unsealed, unless the court enters an Order-upon motion by one or both of the parties-to permanently seal the Amended Order. In addition, all currently pending motions filed by the SF Defendants are hereby denied as moot, unless the SF Defendants notify the court within 10 days from the date the Amended Order is entered that any pending motion need be decided. According to the court's docket, the following motions are still pending:

(1) Motion by SF Defendants for Reconsideration of Order Denying Protective Order (docket #261);

(2) Motion by SF Defendants for Leave to File Amended Counterclaim (docket #330);

(3) SF Defendants' Objection to Magistrate Judge's Denial of Motion for Sanctions (docket #598); and

(4) SF Defendants' Objection to Magistrate Judge's May 2, 2000 Order (docket #600).

Each party shall bear its own costs.

# TAB 4

DOCKET NO. 40131
ASHLEY CREEK PHOSPHATE COMPANY
v.
CHEVRON PIPE LINE COMPANY

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Decided January 31, 1989

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Defendants required to establish rates and publish a tariff for transportation of phosphate by slurry pipeline. General guidance given regarding the manner in which the reasonableness of the rates published by defendants would be judged. Request for damages and attorneys' fees denied.

## DECISION

BY THE COMMISSION:

In this proceeding, complainant seeks a rate prescription for movements of slurry phosphate through defendants' pipeline in Utah and Wyoming.[1]

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[1] Ashley Creek's complaint named Chevron Pipe Line as defendant. Chevron U.S.A., Inc., an affiliate of Chevron Pipe Line, interposed itself as a defendant because it owns the phosphate slurry pipeline that is at the center of this controversy.

Chevron U.S.A. notes that Chevron Pipe Line has the responsibility of owning and managing those Chevron pipelines that are subject to the Interstate Commerce Act (ICA) and that operate under a tariff. Chevron U.S.A. has stated that the phosphate slurry pipeline would be transferred to Chevron Pipe line when it met both of these criteria. But in response to the ALJ's comments at the hearing, Chevron U.S.A. further states that it has transferred the

Defendants have no published rates, and claim that none are needed until complainant is prepared to begin shipping. In his Initial Decision, the Administrative Law Judge (ALJ) found that the complainant had failed to establish a sufficient basis for the immediate publication of any rate. The ALJ recommended: (1) that the parties be required to resume negotiations and establish a contract rate within two years; and (2) that the complaint be dismissed without prejudice to reopening should the parties fail to reach agreement within the two year period. We are considering here separate appeals to the Initial Decision filed by the complainant and the defendants.[2]

Upon review of the record, we conclude that the ALJ erred by not requiring defendants to file a tariff and by requiring the parties to negotiate a contract. We therefore are granting the request by complainant Ashley Creek Phosphate Company (Ashley Creek) that defendants Chevron Pipe Line Company (Chevron Pipe Line) and Chevron U.S.A., as common carriers by pipeline, be required to establish rates and publish a tariff in accordance with 49 U.S.C. §§ 10702(a) and 10762 for the transportation of phosphate through defendants' phosphate slurry pipeline between Vernal, UT, and Rock Springs, WY. We also offer general guidance regarding how we would judge the reasonableness of the rate

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phosphate slurry pipe line and related facilities to Chevron Pipe Line.

Our action in this proceeding is directed at whichever Chevron entity is to operate the pipeline and we expect that entity to comply with our order.

[2] We deny complainant's request for oral argument. We have a record before us that is adequate to resolve the issues.

defendants publish. We are denying complainant's request for damages because Ashley Creek has not shown that it has sustained ascertainable direct harm from defendants' failure to establish rates and publish a tariff. Ashley Creek's request for attorneys' fees under 49 U.S.C. §11705(d)(3) is inappropriate and is denied.

## BACKGROUND

Defendants, Chevron Pipe Line and Chevron U.S.A. are members of the Chevron Corporation (Chevron) corporate family.[3] Chevron U.S.A. owns a phosphate mine in Uintah County, UT, a phosphate mill at Vernal, UT, and a phosphate slurry pipeline that extends from Vernal to Rock Springs, WY. Another Chevron affiliate, Chevron Chemical Company (CCC), uses phosphate mined and milled by Chevron U.S.A. to produce fertilizer at its plant at the terminus of the pipeline in Rock Springs. CCC also sells phosphate rock it obtains from Chevron U.S.A. Still another Chevron affiliate, Chevron Resources Company (CRC), operates Chevron U.S.A.'s slurry pipeline and facilities at Vernal.

Chevron constructed its phosphate slurry pipeline in 1985 and 1986 and began transporting phosphate slurry in May 1986.[4] pipeline greatly exceeds the capacity of

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[3] We will on occasion refer to defendants and/or their affiliates simply as "Chevron".

[4] Chevron's pipeline was built over a right-of-way granted by the Bureau of Land Management (BLM), Department of the Interior. BLM desired to limit the number of pipelines through this environmentally sensitive area. It therefore granted the right-of-way with the understanding that Chevron's pipeline would be operated

Chevron's Rock Springs plant. When it constructed the pipeline, Chevron considered building a pipeline made of 8-inch pipe with three pumping stations, but found that by expanding the pipe to 10 inches it could eliminate a pumping station. Consequently, Chevron was able to expand the pipeline's capacity to allow for future expansion of its Rock Springs operations, while reducing total construction costs.

Complainant Ashley Creek holds mineral leases to mine phosphate on approximately 2,852 acres of land[5] in Uintah County, UT, near Chevron's operations and has filed prospecting applications for an additional 3,000 acres on Federal land in the same vicinity. Complainant does not ship phosphate at this time. Ashley Creek has not developed its mineral rights because, it contends, it has been unable to obtain specific information about the rates it would have to pay to transport its potential phosphate traffic. Ashley Creek thinks that its phosphate can be transported most efficiently by pipeline and wants Chevron to publish a tariff for phosphate shipments so that it can determine whether it would be economically practical to develop its phosphate holdings.

On November 4, 1986, in response to Ashley Creek's request for rate information for phosphate pipeline movements, Chevron provided preliminary estimates of a

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as a common carrier subject to the jurisdiction of this Commission. *See* Initial Decision at Appendix C.

[5] The Division of State Lands and Forestry (Division) of the State of Utah is the lessor of Ashley Creek's existing phosphate leases. The Division intervened in support of the complainant because Ashley Creek's inability to develop the leases would result in the loss of potential royalties to the intervenor.

tariff rate expressed in dollars per ton of phosphate concentrate (on a dry rock basis) for various levels of traffic ("throughput"). Chevron also indicated that complainant's use of the pipeline would be subject to Chevron's rules requiring shipment segregation, facilities construction, and water transportation and consumption. Ashley Creek was not satisfied with Chevron's response and, on November 25, 1986, filed its complaint.

Ashley Creek's complaint alleges that Chevron has operated the pipeline since June 1986 without a published tariff in violation of 49 U.S.C. §§ 10702, 10761, and 10762. The complaint charges that Chevron's rate proposals were unreasonable in violation of 49 U.S.C. §§ 10701, 10704(b)(2), and 10762. Ashley Creek alleges that Chevron's proposed rates and pipeline access rules were "part of a scheme" to deny complainant access to the slurry pipeline and to prevent it from competing with various of the Chevron companies. Ashley Creek asserts that Chevron violated 49 U.S.C. § 11101 by "fail[ing] to provide a reasonable rate and tariff, and rules and practices for carriage on [Chevron's] pipeline" in the face of Ashley Creek's request. It suggests that Chevron was aware that this failure impaired Ashley Creek's ability to plan the development of its properties.

By way of relief, Ashley Creek asked that the Commission require Chevron to publish a tariff with reasonable rates and to establish appropriate rules and practices. Complainant also requested that the Commission assess damages and attorneys' fees against Chevron under 49 U.S.C. § 11705(b)(2) and (d)(3).

In response, Chevron acknowledged that its pipeline operation is subject to our jurisdiction. Nevertheless, Chevron denied that it violated the Interstate Commerce Act (ICA) by operating without a tariff because, it claimed, it was not a common carrier for hire, noting that it carried phosphate only for itself and that no third party had requested access to the pipeline. Chevron concluded that, under the circumstances, it was not required to file a tariff.[6]

Chevron further argued that its preliminary tariff figures were formulated using "traditional public utility ratemaking methods" and that its operating rules were reasonable in light of the constraints involved in operating a phosphate slurry pipeline. Chevron noted that Ashley Creek filed its complaint without discussing the preliminary rates with defendants. Chevron also argued that construction of additional facilities was needed to accommodate a third party's shipments.

Chevron rejected Ashley creek's claim that it had thwarted complainant's development of its properties and suggested that "since Complainant's initial contact with the Defendant in February of 1984, Defendant has fully cooperated with Complainant." Chevron U.S.A. urged that the complaint be dismissed, or in the alternative, that the complaint be held in abeyance while the parties

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[6] It may appear facially inconsistent for Chevron to argue that it is not a common carrier subject to our regulation while admitting that it is subject to our jurisdiction. However, the discussion, *infra*, regarding *United States v. Champlin Rfg. Co.*, 341 U.S. 290 (1951) indicates when, and under what circumstances, a pipeline carrier becomes a common carrier.

reviewed Chevron's proposed rates and operational rules in an attempt to settle the dispute.

Oral hearing was held, a substantial record was compiled, and the Initial Decision was issued May 31, 1988. The ALJ determined that, although it was a common carrier by pipeline, Chevron did not have to file a tariff because Ashley Creek was not yet able to ship phosphate.[7] Nevertheless, the ALJ noted that Ashley Creek's intent to ship phosphate was not frivolous and that complainant had a need for a published tariff for movements through Chevron's pipeline.

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[7] The ALJ correctly declined to rely on a letter dated June 17, 1983, from the then Deputy Director of the Commission's Office of Proceedings (Rail Section) concerning a molten sulphur pipeline to be operated by Chevron U.S.A. because it is a different pipeline with a different set of facts. Initial Decision at 4. In that letter, the Deputy Director suggested that Chevron need not file a tariff because the molten sulphur pipeline would perform no for-hire transportation. The Deputy Director indicated Chevron needed only to certify annually to the Commission that it was maintaining the molten sulphur pipeline's accounts in accordance with the Commission's uniform system of accounts for pipelines.

The facts with which the June 17, 1983, letter are concerned are easily distinguished from those in this proceeding. The molten sulphur pipeline had not yet attracted a potential shipper for which a tariff was required. Here, to the contrary, we have Ashley Creek, a shipper claiming need for a tariff to aid in determining the feasibility of its development and, eventually, to move its phosphate.

In any event, the June 17, 1983, letter was merely an informal staff opinion and is not binding on the Commission. Nevertheless, we assess no damages for Chevron's failure to file a tariff.

The ALJ also described how Chevron should establish rates for movements of Ashley Creek's phosphate. The ALJ noted that differential pricing was appropriate for transportation through the pipeline, but rejected Ashley Creek's primary justification for differential pricing. Initial Decision at 7. Under complainant's scheme, Chevron would pay a higher rate for primary service while Ashley Creek would pay a lower rate for an inferior interruptible service, *i.e.*, if the demand for the pipeline's services were to exceed capacity, Chevron's traffic would take precedence. Instead, the ALJ noted that the pipeline's capacity greatly exceeds any projected demand, including Ashley Creek's incremental load. Furthermore, the ALJ noted that Chevron's policy and operational history tended to show that Chevron would prorate capacity among shippers in the unlikely event that shippers' demand exceeded full capacity. Initial Decision at 7. The ALJ concluded that Ashley Creek would not receive an inferior service and therefore should not enjoy a more favorable rate.

The ALJ, however, accepted Ashley Creek's alternative justification for differential rates, *i.e.*, shipments of phosphate moving beyond Rock Springs required a lower rate to compete in markets other than Rock Springs.[8] Initial Decision at 9.

The ALJ concluded that, although a tariff was appropriate, Chevron should not be required immediately to file a tariff. He noted that Ashley Creek would not

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[8] The ALJ was unable to determine the details of Chevron's experience in marketing phosphate rock to points in Canada because Chevron refused to disclose its so-called "Cominco contract." Initial Decision at 9.

become a shipper for two years at the earliest. In view of the possibility that rates could change, he feared that a tariff could become obsolete once Ashley Creek is ready to ship. Initial Decision at 17. Instead, the ALJ dismissed Ashley Creek's complaint and ordered Ashley Creek and Chevron to negotiate a differential rate to be filed by Chevron within two years. *Id.* At 18.

## DISCUSSION AND CONCLUSIONS

*Tariff Filing Requirement.* The fundamental issue is whether Chevron must now file a tariff. Our jurisdiction extends to "transportation * * * by pipeline * * * when transporting a commodity other than water, gas or oil * * * between a place in—a State and a place in another State * * *" 49 U.S.C. § 10501(a). Chevron does not dispute the applicability of this statutory provision to its operations. *See* Appeal of Chevron from Initial Decision, filed July 15, 1988, at 6, and note 4, *supra.*

Furthermore, "[a] carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall publish and file with the Commission tariffs containing the rates and * * * if a common carrier, classifications, rules and practices related to those rates * * * " 49 U.S.C. §10762(a)(1)(A).

Chevron suggests that it fits within an exception to the tariff filing requirement that arose in connection with interpretations of this agency's former jurisdiction over oil pipelines under the Hepburn Act of June 29, 1906. 34 Stat. 584. Shortly after passage of the Hepburn Act, a number of oil pipelines sought to avoid the Act's coverage

by arguing that they owned the oil they transported and did not hold themselves out to the public as common carriers. In *The Pipe Line Cases*, 234 U.S. 548 (1914),[9] the Supreme Court ruled that the Act subjected to regulation as common carriers all pipelines transporting oil in interstate commerce and required the pipeline companies to file schedules of rates and charges. The Court recognized that the affiliated oil companies controlled most pipeline facilities and were able to exert market power to force small oil producers to sell their oil to the affiliates prior to transportation through the pipelines. The Court found that the Act brought "within its scope pipe lines that although not technically common carriers yet were carrying all oil offered, if only the offerers would sell at their price. *Id.* At 560. As the Court later explained, "the Act was passed to eliminate the competitive advantage which * * * integrated pipelines might possess from exclusive ownership of a pipeline." *United States v. Champlin Rfg. Co.*, 341 U.S. 290, 297 (1951) (*Champlin II*).

As an exception to its finding that the pipelines were common carriers and had to file tariffs, the Court, in the *Pipeline Cases, supra*, found that one of the companies, the Uncle Sam Oil Company, was not a common carrier because it transported only oil produced from its own wells to its own refinery and did not transport oil purchased from others. When the Court, in *Champlin II, supra,* at 298, revisited the issue of which pipelines were common carriers (and were required to file a tariff) under the Act, it suggested that:

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[9] Although the Commission no longer has jurisdiction over oil pipelines, these cases are instructive concerning our remaining jurisdiction over transportation of other commodities via pipeline.

The term "all pipe lines" was meant to impose full regulation on integrated producer pipelines who exploit a competitive advantage simply by refusing to deal with independent producers having no comparably cheap method of reaching consuming markets. But * * * Congress, in adopting a term broad enough to cover all competitive imbalances which might arise, [did not intend} that the Commission should make common carriers for hire out of private pipe lines whose services were unused, unsought after, and unneeded by independent producers.

Chevron clearly does not fall within the exception from common carrier status (and the tariff filing requirement) as delineated by the *Pipeline Cases, supra,* and *Champlin II, supra.* Chevron is an integrated pipeline operator the Act was meant to cover. It has a facility that independent producers, such as Ashley Creek, need to transport their commodity.[10] Ashley Creek has stated its interest and need to use Chevron's pipeline when its production starts.

Chevron also suggests we evaluate complainant's need for a tariff using a test developed in construing Section 4 of the Clayton Act, called the "intention and preparedness test."[11] Chevron, however, ignores an

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[10] BLM recognized the need to limit the number of pipelines and recognized Chevron as a common carrier. *See* note 4, *supra.*

[11] *See e.g., Central Telecommunications, Inc. v. TCI Cable Vision, Inc.,* 800 F.2d 711, 727-28 (8th Cir, 1986), *cert, denied,* 107 S. Ct,1358 (1987) and *Denver Petroleum Corp. v. Shell Oil Co.,*306 F. Supp. 289, 308-08 (D. Colo. 1969). Courts often apply this test to a plaintiff who claims that the defendant's anticompetitive conduct injured the plaintiff by thwarting the plaintiff's attempt to enter a market (the "potential entrant"). This is to be distinguished from the plaintiff who claims injury in the form of reduced or eliminated profits from a business established in the market made to

important distinction. Section 4 of the Clayton Act does not govern access to information. Rather, it governs the right to receive money damages. By contrast, 49 U.S.C. § 10762 (d)(1)(a). Consequently, we do not find Chevron's analogy to Section 4 of the Clayton Act useful in construing the tariff filing requirement of the ICA and it does not support Chevron's narrow construction of that requirement.

The proper construction of § 10762(a) requires a common carrier subject to the Commission's jurisdiction to file a tariff when presented with a potential shipper with a demonstrable business or business planning need for the information. This holding is supported by Congress's instruction to us "to encourage the *establishment* and maintenance of reasonable rates for

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malfunction by anticompetitive conduct (the "established businessman").

Obviously, measuring the potential entrant's damages is more difficult than measuring those of the established businessman. *See Grip Pal, Inc. v. Illinois Tool Works, Inc.*, 694 F. 2d 466, 475 (7tj Cir. 1982), *cert. denied,* 461 U.S. 958 (1983). The obvious uncertainty of success of the plaintiff's venture, even absent the anticompetitive conduct, can so cloud the question that the calculations can become conjectural. Nevertheless, the policy of Section 4 of the Clayton Act is to induce injured plaintiffs to punish violators by offering the reward of treble damages, a policy that would be fettered were all potential entrants denied damage awards. *See id.; see also Illinois Ex Rtel. Hartigan v. Panhandle Eastern Pipe line Company,* 852 F.2d 891, 897 (7th Cir. 1988) (*en banc),* petition for *cert.* pending. No. 88-658 (filed Oct. 17, 1988(discusses damages for claims of lost sales by ongoing concern). The "intention and preparedness" test is used to determine when a potential entrant is eligible to collect treble damages.

transportation * * * " 49 U.S.C. §10101a(1)(D). (Emphasis added.) The Interstate Commerce Act (ICA) grants shippers a right to this information in the form of a tariff.

In *San Antonio, TX v. Burlington Northern, Inc.*, 355 I.C.C. 405, 407, 413 (1976), *aff'd sub nom. Burlington Northern, Inc. v. United States*, 555 F.2d 637 (8th Cir. 1977) (*San Antonio I*), we implied that we would have required the carrier to publish a tariff containing a unit-train rate (even though the carrier had a class rate on file) had the carrier not published a unit-train tariff during the course of the proceeding. *San Antonio I, supra,* at 418. *San Antonio I, supra*, also shows the problems that can arise if shippers rely upon informal estimates of carrier rates rather than on filed tariffs. *See San Antonio I, supra,* at 407. *See also San Antonio, TX v. Burlington Northern, Inc.*, 359 I.C.C. 1 (1978).

The Commission has said that it would not "prescribe rates for a purely hypothetical change in transportation characteristics that may arise in the future." No. 36579, *Houston Lighting & Power Company v. Burlington Northern, Inc., et al.* (not printed), served August 22, 1978 (*HL&P).* In that proceeding, however, there was already in existence an effective tariff governing the transportation of the complainant's coal over the route of movement at issue, and the rate and other conditions of that tariff had been found to be lawful. *HL&P, supra,* unprinted decision served February 6, 1978. Furthermore, the transportation characteristics on which the effective tariff was based were those described by the complainant and used by the defendant in designing the tariff.

The situation in *HL&P*, *supra*, is easily distinguished from what Ashley Creek faces here. Ashley Creek is not asking Chevron to change its tariff to reflect unnecessary and hypothetical events. Instead, Ashley Creek is without any tariff at all on which to base its business decisions.

The ALJ feared that a tariff filed by Chevron Pipe Line would become obsolete by the time that Ashley Creek was ready to ship. While that may be true, Ashley Creek nevertheless is here entitled to the best available information for its business planning purposes. Chevron's November 1986 estimate is not a tariff, is inadequate under the ICA, and will not satisfy a prospective shipper's needs. By definition, the estimate lacks certainty.

The Commission has always recognized the importance of a tariff in enabling a business to make an informed decision on transporting its products. *See Rice v. Louisville and Nashville Railway Company,* 1 I.C.C. 503, 532 (1888). The Commission and the courts have recognized that consideration of precedents relating to railroad and motor carrier operations in cases involving pipelines must be subject to "careful review of circumstances of pipeline operations." *United States Dept. of Defense v. Interstate Storage and Pipeline Corp.*, 353 I.C.C. 397, 401 (1977; *Farmers Union Central Exchange v. FERC,* 584 F.2d 408, 413 (D.C. Cir.), *cert. denied,* 429 U.S. 995 (1978). Therefore, we recognize that our decision in this case must turn on the specific facts of record and that its future precedential effect is accordingly limited. The record in this case, shows a pipeline that is admittedly a common carrier and a

potential shipper that has specifically requested tariff publication and whose plans for future development are contingent upon reliable rate information. On this record, we believe that application of the tariff filing principles adopted in the railroad context is appropriate. Therefore, we will require Chevron to file a tariff pursuant to §§ 10702(a), 10761(a), and 10762(a)(1)(A), and in compliance with 49 C.F.R. Part 1312 within 90 days of the date of service of this decision.[12]

*Maximum Reasonableness Guidelines.* We have established that defendants must file a tariff. We take this opportunity to offer some general guidance. While our order directing that defendants file a tariff within 90 days supercedes the ALJ's negotiation directive, negotiation can play an important role in producing a tariff that both Ashley Creek and Chevron find acceptable. Should Chevron and Ashley Creek work together and arrive at a tariff in which they both concur, we would not anticipate a protest by Ashley Creek. This result would be most advantageous for all concerned. Of course, Ashley Creek or any other party may challenge that tariff via protest or complaint.

Chevron asserts that differential pricing is inappropriate for movements through its pipeline because, under differential pricing, one shipper would receive an advantage denied other shippers.[13] Chevron

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[12] Because we are directing that a tariff be filed, we need not address the ALJ's directive that a contract rate be negotiated.

[13] Chevron also argues that the Initial Decision is inconsistent with recent orders of the Federal Energy Commission concerning oil

acknowledges that this agency has prescribed differential rates for railroads. It argues, however, that its pipeline has never been revenue inadequate and, therefore, should not be treated as are railroads.[14] Ashley Creek argues that differential pricing should not be limited to revenue inadequate railroads.

In establishing rates, Chevron should look to *Coal Rate Guidelines, Nationwide,* 1 I.C.C.2d 520 (1985) (*Guidelines*), *aff'd sub nom. Consolidated Rail Corporation v. United States,* 814 F.2d 1444 (3d Cir. 1987) for guidance. In that proceeding we adopted Constrained Market Pricing (CMP) to determine the reasonableness of rates to be paid by rail-captive coal

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pipelines. The decisions of that agency, although they may be helpful, are not binding upon this Commission.

[14] Chevron presents a number of arguments that need not be addressed until it has filed a tariff and then only if its rate has been challenged. For example, Chevron notes that its cost of transporting one ton of phosphate slurry is the same regardless of whether that one ton moves beyond Rock Springs. Chevron claims that the record does not support a differential rate because the western fertilizer market is not a distinct geographic region with definable economic boundaries. Rather, Canadian producers participate in this market. Chevron also claims that there is no evidence to show that Canadian fertilizer manufacturers suffer any competitive disadvantages due to transportation costs or that, if there is such a competitive disadvantage, it would be visited upon Ashley Creek. Nor need we address here complainant's response that there is no evidence to enable the Commission to ascertain that Canadian-manufactured fertilizer competes with Chevron's fertilizer.

shippers.[15] Most notably, our use of the stand-alone pricing concept appears relevant here.

One noted observer has said that "the pipeline industry can be considered as naturally monopolistic, that is, a single large pipeline in a given market could operate more cheaply than a number of companies with smaller pipe." D. Locklin, *Economics of Transportation* at 605 (6th Ed. 1966).

CMP, which was formulated to address rate concerns of captive rail shippers, should be a useful analytical tool to apply to ratemaking for the phosphate slurry pipeline. Pipelines and railroads share the characteristic of high fixed costs and are capital intensive. Furthermore, Ashley Creek's potential traffic appears quite similar to unit train, large volume coal movements to which we have applied the tests of *Guidelines, supra,* absent a persuasive showing that those principals should not apply.

*Other matters.* Finally, the ALJ made a number of findings and conclusions concerning specific tariff issues

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[15] The goals of CMP are that: (1) a captive shipper should not be required to pay more than is necessary for the carrier(s) involved to earn adequate revenues; (2) a captive shipper should not pay more than is necessary for efficient service; (3) a captive shipper should not bear the costs of any facilities or services from which it derives no benefit; and (4) responsibility for payment for facilities or services which are shared (to its benefit) by other shippers should be apportioned according to the demand elasticities of the various shippers. *See* 1 I.C.C.2d at 523-24. In addition, any change in rates should be gradual enough to avoid economic dislocations. *Id.* at 524.

(*e.g.*, capital structure, return on equity, and rate design) that, in light of our action here, are premature. These findings and conclusions are vacated, and we need not address in detail the parties' criticism of them.[16]

The Initial Decision did not resolve Ashley Creek's claim for damages. Ashley Creek assumes that the failure to order damages is tied to the ALJ's refusal to require Chevron Pipe Line to file a tariff immediately. Ashley Creek contends that damages should be awarded to deter other common carriers from failing to file tariffs at the appropriate time. Complainant also seeks attorneys' fees.

Chevron contends that Ashley Creek has suffered no direct injury to justify an award of damages and that only a district court can award attorney's fees.

Ashley Creek's claims for damages under 49 U.S.C. § 11705(d)(3) are denied. Ashley Creek admits that it is not ready to ship phosphate rock and has not suffered any

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[16] Chevron criticizes the ALJ's conclusion that the pipeline should be viewed as having a capital structure that consists of one-third equity and two-thirds debt. Chevron claims that the pipeline does not qualify for debt financing. The pipeline has no take-or-pay or ship-or-pay contract with a shipper nor does the pipeline serve an established market consisting of a large number of customers. Also, continued operation of the pipeline poses large technological risks.

Ashley Creek asserts that, had the pipeline been established independently of the other Chevron entities, the pipeline would have secured a take-or-pay contract. Ashley Creek goes on to argue that, since the pipeline would have secured a take-or-pay contract at the outset of its operation, the pipeline would have protected itself from the technological risks that Chevron mentioned

direct damage. *See* Ashley Creek's Appeal and Request for Oral Argument, filed July 13, 1988, at 5 ("Complainant has not had an existing business in place to be damaged by this behavior."). Ashley Creek's contention that it "has lost time and has been required to assume very substantial costs in compelling defendant to recognize its obligations and in demonstrating the appropriate tariff" does not justify awarding damages here. Although Chevron's failure to file a tariff may have caused complainant to incur certain expenses, the relationship is too indirect to permit us to award damages under 49 U.S.C. § 11705(b)(2). Before any party can recover under the Act, he must show not merely the wrong of the carrier, but that the wrong has in fact operated to his injury. *Pennsylvania Railroad Company v. United States,* 230 U.S. 184, 200 (1913) (*quoting Parsons v. Chicago and North Western Railway Company,* 167 U.S. 447, 460 (1897)).

In addition, to the extent that some of Ashley Creek's expenses are litigating costs, we may not award them. *See Industrial Commission v. New Jersey & New York Railroad Company,* 324 I.C.C. 272, 273 n.1 (1965). For example, we do not have authority to award attorneys' fees to Ashley Creek. *See Hightower Box & Tank Co., Inc. v. Alabama G.S.R. Co.,* 294 I.C.C. 503 (1955). The section cited by complainant (§ 11705(d)(3)) clearly states that "[t]he District Court shall award a reasonable attorney's fee" (emphasis added).[17]

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[17] And even the District Coutts do not have authority under §11705(d)(3) to award litigating costs or attorneys' fees absent a findings of liability and an award of damages. *Illinois C.G.R. Co. v. Delta Millwork, Inc.*, 802 F.2d 156, 157-58 (5th Cir, 1986). In this case, we have not found Chevron liable for damages.

This decision will not significantly affect either the quality of the human environment or energy conservation.

*It is ordered:*

1. To the extent that it is inconsistent with this decision, the Initial Decision is vacated.
2. Ashley Creek's appeal is granted to the extent discussed above. In all other respects, it is denied.
3. Chevron's appeal is denied.
4. Chevron must establish rates and file with the Commission a tariff for the transportation of phosphate through defendants' slurry pipeline by May 8, 1989. The tariff must satisfy the requirements of 49 U.S.C. § 10762 and 49 C.F.R. Part 1312.
5. Ashley Creek's request for damages and attorneys' fees is denied.
6. Ashley Creek's request for oral argument is denied.
7. This decision is effective on March 9, 1989.

By the Commission, Chairman Gradison, Vice Chairman Andre, Commissioners Simmons, Lamboley, and Phillips.

# TAB 5

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# SURFACE TRANSPORTATION BOARD[1]
# DECISION

No. 40131 (sub-No.1)

ASHLEY CREEK PHOSPHATE COMPANY
v.
CHEVRON PIPE LINE COMPANY, ET AL.

No. 40810

ASHLEY CREEK PHOSPHATE COMPANY
v.
SF PHOSPHATES LIMITED COMPANY, ET AL.

Decided: October 28, 1996

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[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 State. 803 (the ICCTA), abolished the Interstate Commerce Commission (ICC or Commission) and transferred certain functions and proceedings to the Surface Transportation Board (Board) effective January 1, 1996. Section 204 (b) (1) of the ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the ICCTA. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 15501. Therefore, this decision applies the law in effect prior to the ICCTA, and citations are to the former sections of the statute.

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## I. INTRODUCTION

In these complaint proceedings, Ashley Creek Phosphate Company (Ashley Creek or complainant) alleges that Chevron Pipe Line Company, et al- and SF Phosphates Limited Company, et al- (collectively, defendants) acted unlawfully by establishing unreasonable and discriminatory rates and practices for the transportation of phosphate slurry through a pipeline between Vernal, UT, and Rock Springs, WY. This proceeding is before us on referral from the U.S. District Court for the District of Utah, Central Division, in Ashley Creek Phosphate Company v. Chevron U.S.A., Inc. No. 89-C-554-S (Referral order dated September 21, 1989).[2]

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[2] Ashley Creek initiated the court action, on June 19, 1989, by filing an antitrust complaint alleging the monopolization of the interstate transportation of phosphate rock concentrate from Vernal

## II. BACKGROUND

Ashley Creek holds mineral leases to mine phosphate in Uintah County, UT. Ashley Creek has not yet developed its mineral rights or made any shipments. Defendants in the lead proceeding (collectively, Chevron)[3] constructed the pipeline in 1985-86, and began transporting phosphate slurry in May 1986. In November 1986, in response to Ashley Creek's request for rate information for phosphate pipeline movements, Chevron provided preliminary rate estimates but declined to publish a tariff.

On November 25, 1986, Ashley Creek filed a complaint with the ICC alleging that Chevron was a common carrier by pipeline unlawfully operating without a published tariff, in violation of 49 U.S.C. 10702, 10761, and 10762. In a decision in Docket No. 41031, served February 7, 1989,[4] the ICC determined that Chevron was

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to Rock Springs. The referral order is limited to the issue of whether the terms established by the defendants for transporting phosphate slurry from Vernal to Rock Springs are unjust, unreasonable or discriminatory.

[3] The five defendants are: (1) Chevron Pipe Line Company (CPL), which acquired the subject pipeline in April 1988; (2) Chevron Chemical Company (CCC), which operated a fertilizer plant at Rock Springs and shipped phosphate through the pipeline; (3) Chevron U.S.A., Inc. (CUSA), which owned and operated a phosphate mine and mill at Vernal and initially owned the pipeline; (4) Chevron Industries (CI), a division of which operated the Vernal facilities and performed certain pipeline operational functions; and (5) Chevron Corporation (Chevron), which is the parent company of CPL, CCC, CUSA, and CI.

[4] Ashley Creek Phosphate Co. v. Chevron Pipe Line Co., 5 I.C.C.

a common carrier and ordered it to establish rates and file a tariff for the transportation of phosphate through the subject pipeline.

Chevron subsequently published a tariff, which was scheduled to take effect June 20, 1989. The day before the tariff became effective, Ashley Creek filed its antitrust suit against Chevron. The District Court referred the matter of whether the tariff was unjust, unreasonable or discriminatory to the ICC.[5] On December 21, 1989, Ashley Creek filed its complaint on referral [docketed as No. 40131 (Sub-No. 1)], alleging that the tariff rate was unreasonable in violation of 49 U.S.C. 10701.

In a decision served February 15, 1992, the ICC directed the parties to file evidence and argument on what methodology should be used to evaluate whether the tariff rates were unreasonably high. Ashley Creek suggested use of the ICC's "constrained market pricing" (SAC), which bases the maximum rate on the revenues needed to build and operate a competitive alternative to the incumbent.[6] Chevron urged the ICC to use "original cost ratemaking" (OCR), a method which bases the maximum rate on the amount needed by the carrier to recover its initial investment costs and operating costs,

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2d 303 (1989).

[5] CPL changed its rates on August 15, 1991, with publication of tariff CHVP No. 2, and again on February 4, 1992, with publication of tariff CHVP No. 3.

[6] Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520 (1985) (Rate Guidelines), aff'd sub nom. Consolidated Rail Corp. v. U.S., 812 F.2d 1444 (3d Cir. 1987).

and earn a fair return. On March 30, 1992, the ICC issued a decision concluding that a "hybrid" ratemaking model, employing elements from both SAC and OCR, should be used for judging the challenged rates in this proceeding.

On April 17, 1992, Chevron sold its entire phosphate fertilizer project to SF Pipeline Limited Company (SFPL) and SF Phosphates Limited Company (SF Phosphates).[7] At the time of the pipeline purchase, SFPL adopted the Chevron tariff then in effect.[8] Accordingly, on June 1, 1992, Ashley Creek filed another complaint with the ICC (docketed as No. 40810) naming SFPL, SF Phosphates, Simplot, and Farmland as defendants and repeating the allegations contained in its original complaint.

In a decision served December 29, 1992, the ICC consolidated the two complaints (in dockets No. 40131 (Sub-No.1) and No. 40810) and indicated that it would apply the identical ratemaking methodology in each case. Thereafter, in a decision served February 24, 1993, the ICC set a procedural schedule for the submission of

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[7] SFPL and SF Phosphates were created as joint ventures of J.R. Simplot Company (Simplot) and Farmland Industries, Inc. (Farmland), to own and operate the phosphate slurry pipeline (SFPL) and the Vernal mine and Rock Springs fertilizer plant (SF Phosphates).

[8] Chevron had published a second tariff effective August 15, 1991, and a third tariff effective February 28, 1992. Each reduced the rates of the prior tariff. The rates in the second tariff were based on an estimated pipeline life of 14 years. On determining the estimate to be incorrect, Chevron published the third tariff to establish rates based on a 20-year-pipeline life. The first tariff also had used a 20-year life estimate for the pipeline.

evidence and arguments in both cases. The administrative record was completed on June 20, 1995.

## III. PROCEDURAL MATTERS

Before turning to the merits of the complaints, we first dispose of various motions that are pending.

### A. Defendants' Motion to Strike Rebuttal Material.

On June 22, 1995, defendants filed a motion for leave to late-file a motion to strike, along with a motion to strike portions of Ashley Creek's rebuttal evidence.[9] Defendants acknowledge that they previously had sought leave to file surrebuttal on the issue of the ability of Ashley Creek's president, John D. Archer, to obtain financing, but that, in its decision of April 21, 1995, the ICC denied the request. Defendants argue that, given the circumstances, a motion to strike is their sole avenue for bringing this matter to our attention.

Defendants' motion to strike is based on asserted conflicts between Witness Archer's statements and those contained in an August 1994 affidavit by David L. Brown, Senior Vice President of Key Bank of Utah. (Complainant had inadvertently attached Witness Brown's affidavit to its rebuttal.) Defendants contend that, as Archer's ability to obtain financing is relevant to several issues in this proceeding, and Brown's affidavit

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[9] Defendants move to strike paragraphs 10 and 48 of Witness Archer's rebuttal affidavit and other statements relying on those paragraphs at paged 5 and 10 of complainant's summary of its rebuttal and page 18 of the Travis/Bateson rebuttal statement.

calls the veracity of Archer's statements into serious doubt, we should grant their motion to strike.

In reply, Ashley Creek asserts that, if the tendered pleading is in fact a motion to strike, defendants have submitted it 9 months late without any justification for late filing.[10] Complainant argues, however, that the pleading is, in fact, simply impermissible surrebuttal argument regarding the issue of Archer's financial viability. Complainant responds to the argument and counters the assertions that Brown's affidavit contradicts Archer's statements.

We agree that defendants' motion is nothing more than a surrebuttal argument that the ICC specifically prohibited in its April 1995 decision. Defendants have ignored the ICC's admonishment to the parties to "file only those pleadings in the future that are permitted by Commission rules at 49 CFR Part 1104 or that are specifically requested by this agency." Decision of February 15, 1991, at 8. Accordingly, we deny the motion for leave to file.

B. Complainant's Motion to Strike Surrebuttal Material.

On July 5, 1995, Ashley Creek filed a motion to stroke portions of defendants' surrebuttal or, in the alternative, for leave to "enlarge the record." Complainant moves to strike specified portions of the surrebuttal concerning the use of July 20, 1989, as the starting date

[10] Under 49 CFR 1104.13, a motion to strike is due 20 days after the filing of the pleading it addresses. Thus, defendants' motion was due October 3, 1994.

for the computation of the 20-year period, and the reliance on market forecasts of Dr. Robert D. Willig.[11]

Ashley Creek asserts that the April 21, 1995, decision specifically precluded defendants from discussing the 1989 starting date in their surrebuttal. Complainant notes that defendants had the opportunity to discuss the issue in their reply statements. Ashley Creek also tenders reply arguments to the surrebuttal. The complainant requests that we consider these arguments if we deny its motion to strike.

Ashley Creek also argues that defendants improperly used their surrebuttal to reiterate points that Willig had already made in the defendants' reply. Here again, complainant requests that, should we not grant its motion, we consider its additional argument.

Additionally, Ashley Creek argues that it was improper for defendants to use Willig's views because they are based on a privately commissioned study to which complainant has been denied access. Complainant further argues that Willig's prediction that the demand for fertilizer would decline has been proven incorrect; instead, the fertilizer industry is in the midst of an economic boom.

In reply, defendants assert that complainant has misconstrued the April 21, 1995 decision. They argue that the ICC concluded that it would not be appropriate to

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[11] Complainant moves to strike page 1, line 20, to page 2, line 2, of the Introduction; page 2, line 8, to page 5, line 24, of the Argument; and page 5, line 1, to page 8, line 3, and page 9, line 7, to page 10, line 9, of the statement of John C. Klick.

submit surrebuttal addressing the tax implications of the proposed 1986 starting date, but that they were permitted to address Ashley Creek's new evidence comparing revenues and SAC. Because this evidence related to a period beginning in 1986, defendants assert, surrebuttal challenging the 1986 starting date was within the permitted limits.

The defendants maintain that they merely reiterated Willig's earlier statements but, in any event, reference to Willig's statement was necessary in order to address the Travis/Bateson statement submitted on rebuttal. Defendants characterize complainant's arguments as an attempt to file an additional reply to Willig's testimony.

We deny the motion to strike the arguments relating to the 1986 starting date. The April 1995 decision precludes discussion of the 1986 starting date only as relates to the attendant tax implications. Also, the Travis/Bateson material that defendants were permitted to address used a 1986 starting date.

We also deny the motion to strike references to Willig's forecasts. The forecasts are permissible to the extent they relate to the Travis/Bateson material. To the extent they are simple reiterations, complainant is not prejudiced by them. Ashley Creek's arguments that Willig's predictions have not been borne out go to the weight we give that evidence, not its admissibility.

## IV. REASONABLENESS OF THE TARIFF TERMS

The district Court has referred the issue of whether the terms established by the defendants for transportation through the pipeline are unjust, unreasonable, or discriminatory. To assess the reasonableness of the charges, we employ a slightly modified version of the SAC analysis used to evaluate the reasonableness of rail rates. In addition to evaluation the tariff charges, we must also examine whether other provisions of the tariff are unlawful. It is to this issue that we turn first.

A. Non-Rate Matters.

Ashley Creek questions the reasonableness of various components of the tariffs' Rules and Regulations.

1. Definition of Phosphate Slurry.

Item No. 5 defines phosphate slurry as "phosphate concentrate of approximately 31% $P_2O_5$ concentration by weight." Complainant claims that the definition is inadequate and improper. It contends that phosphate slurry should be defined as merely "phosphate concentrate and water." It asserts that defendants' definition could prevent some economically useful shipments and, therefore, is unreasonable.

Defendants note that evidence presented by Ashley Creek shows that its phosphate would have a concentration of 31% and thus would not be affected by the definition in Item No. 5. Defendants further observe that the range of phosphate concentration in the Vernal area is very small - between 29% and 33% - and, thus, any phosphate from that area would meet the tariff definition.

We agree that complainant's own evidence shows that complainant's phosphate slurry meets the Item No. 5 definition.[12] We thus do not see any merit to its contention that the definition is too restrictive.

2. Conformance with required Specifications.

Item No. 10 indicates that phosphate slurry shall be accepted for transportation only when it "meets all required specifications" established by the pipeline operator. Ashley Creek complains that this item, which gives the operator the right to impose specifications, does not disclose the operator's specifications.

Defendants counter that Ashley Creek has presented proposed specifications for its phosphate slurry, and that these specifications meet those of defendants. Thus, defendants maintain that there is no dispute.

As complainant and defendants have exchanged specifications, and their specifications are in accord, we agree that there is no issue to be resolved.

3. Monthly Prorationing.

Item No. 65 requires shippers to make monthly predictions of the amounts to be shipped and provides for apportioning capacity between shippers in the event the total tenders by all shippers exceed the ability of the pipeline to carry all tendered phosphate. Ashley Creek

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[12] See Opening Statement of Facts and Argument of Complainant Ashley Creek Phosphate, Volume II, V.S. David E. Aro, Page 5, filed April 25, 1994.

asserts that this rule serves no legitimate purpose and could permit the competing shipper/pipeline operator to penalize the other shipper by restricting its capacity.

Defendants contend that this is an appropriate prorationing provision that applies only in periods in which shippers propose to tender greater volumes than the pipeline can transport due to capacity constraints. The resulting penalty - a reduction in a succeeding month for amounts of allocated throughput not used during a preceding month - is intended to deter shippers from over-predicting tenders and reserving more pipeline capacity than they will use.

The assailed prorationing provisions of Item No. 65 have not been shown to be unreasonable. Because more than one shipper can use the pipeline, a method for scheduling shipments and accommodating all users is necessary. The plan for prorationing monthly capacity of the pipeline when it is over-subscribed is not per se unreasonable. Moreover, the evidence of record shows that, even were Ashley Creek to ship its proposed 1.08 million tons a year in combination with defendants' historical and projected volumes, the prorationing and penalty provisions of the item never would be applied.

4. Ability to Determine Charges in Advance.

Finally, Ashley Creek complains that, as the tariff rates are based on the total monthly volume of all shipments moving through the pipeline, and volume is dependent on the shipments a second pipeline user tenders, the tariff prevents Ashley Creek from controlling

its transportation charges.[13] Complainant asserts that the lack of control makes it impossible for it to obtain financing for its mining project.

Defendants respond that the pipeline's shipment nomination procedure is, in fact, a means of providing rate certainty. They point out that, prior to making each month's shipments, a shipper is notified as to total nominations (proposed tenders) and is then able to ascertain the tariff rate it will pay. Defendants suggest that the only "risk" a shipper faces is that it will pay a lower rate than it would pay if it were the only shipper. Defendants assert that, in the months when a single shipper uses the pipeline, the shipper controls its rates as it controls the sizes of its own shipments.

Although the structure of the involved tariffs, under certain circumstances, can make it difficult for a shipper to determine its exact monthly charges, we do not believe that the procedures described by the parties here are unreasonable. The rate applicable to each volume range is readily apparent from the tariffs, and, prior to making

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[13] Ashley Creek suggests the use of a two-part tariff under which rates would be set by allocating the fixed cost of the pipeline based on each shipper's estimate of the pipeline capacity it requires–its "reserved pipeline capacity." Ashley Creek maintains that other pipelines use this method to distribute costs and that the Federal Energy Regulatory Commission sets new pipeline rates using reserved capacity and two-part tariffs.

The issue before this Board is the reasonableness of the terms of the defendants' existing tariff, not the relative efficiency of different tariff structures. Therefore, we will limit out review to the terms of the published tariffs.

each month's shipments, a shipper is notified as to the range in which total proposed monthly tenders fall. However, a shipper can determine its maximum charges in advance. A shipper cannot pay a higher rate than it had planned based on its own tonnage. The addition of another shipper's tonnage, if it is to have any effect on rates, can only lower applicable rates by pushing total tonnage into a higher throughput range. Thus, Ashley Creek would, in fact, have a significant degree of control over the rates it would pay.

B. Reasonableness of the Rates.

In its March 1992 decision, the ICC decided to use a hybrid ratemaking mode, based on its SAC constraint, for evaluating the reasonableness of defendants' tariff rates. Under SAC theory, we determine whether a hypothetical new transportation system could be designed and operated in a manner that would allow the new entrant to recover all its costs while being able to offer the shippers using the system lower rates than those offered by the incumbent. In the case of railroads, the exercise generally focuses on whether a new railroad, constructed today, could provide service at lower rates than the rates charged by the incumbent.

In this proceeding, the existing pipeline was constructed approximately one year prior to the filing of the complaint. This greatly simplifies the SAC analysis, by allowing use of the original construction and operating costs of the existing pipeline as a proxy for the costs that would face a hypothetical new entrant.[14] Thus, we will

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[14] Because the parties agree that the hypothetical stand-alone

examine whether the tariff rates would allow the SAPL to recover all of the costs it generates (including a reasonable rate of return on the actual construction costs over its life). If the tariff rates would allow the pipeline to earn greater revenues than needed to recover its costs, then under SAC theory, the tariff rates are unreasonably high.

For purposes of this calculation, the parties agree that the SAPL should be assumed to have a 20-year life. They differ, however, as to when the 20-year analysis should begin. Ashley Creek contends that the SAC analysis must coincide with the actual pipeline's useful life and reflect all costs of operating the pipeline from the date service commenced (which was in April 1986). Defendants contend that the SAC analysis should start from the point when Chevron first held out to provide common carrier service, by publishing a tariff (which was in mid-1989).

The ICC held that Chevron was under an obligation "to file a tariff when presented with a potential shipper with a demonstrable business or business planning need for the information." 5 I.C.C.2d at 310. Thus, we conclude that the appropriate starting point for the SAC analysis is when Ashley Creek demanded a tariff. It is at that point that Chevron was obligated to provide a

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pipeline (SAPL) would mirror the existing pipeline, we use the actual (original) cost of building the existing pipeline to value the investment in the SAPL. The use of original cost introduces an element of OCR into the analysis. However, other than using original cost to determine the cost of constructing the hypothetical pipeline, the "hybrid" rate reasonableness analysis we use is based on standard SAC procedures.

reasonable rate, and it is from that point that we need to hypothesize the existence of a competitor with a pipeline in place by which to measure the reasonableness of the Chevron rates. Complainant made the request for a tariff sometime in 1986. By filing a formal complaint with the ICC on November 25, 1986, Ashley Creek made clear that it was officially requesting a tariff rate. We will thus use the beginning of December 1986 as the date from which the stand-alone pipeline is assumed to have been in place.[15]

We now turn to an examination of the costs that would be incurred by a stand-alone pipeline capable of providing service to Ashley Creek and the defendant shippers. To evaluate the reasonableness of the tariff rates, those costs are then compared to the revenues that would be generated by the tariff rates over the same period.

1. Investment Costs.

The phosphate slurry pipeline is a 96-mile,10-inch diameter pipeline from Vernal to Rock Springs. The main components of the pipeline are the Vernal pump station, a booster pump station, the Rock Springs receiving station (RSRS), and the pipeline connecting the stations.

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[15] Use of December 1 rather than November 25 will have a negligible impact on our findings. We simply shift the analysis by six days to align the analysis at the start of the month and simplify our calculations.

The ICC's March 1992 decision directed that the original cost of the existing pipeline be used to value the investment base for the SAPL. The parties generally agree that the cost to plan and build the existing pipeline in 1986 was $34,997,770.[16] However, Ashley Creek would adjust that original cost to remove the cost of the RSRS ($1,591,902), as well as certain environmental, managerial, surveying and administrative costs that were incurred jointly for this pipeline and for another pipeline that Chevron built at the same time – the Raven's Ridge carbon dioxide ($CO_2$) pipeline (for which Ashley Creek would deduct $534,614). These adjustments if adopted, would reduce the investment base to $32,871,254. We decline to adopt either adjustment.

a. RSRS.

Ashley Creek's elimination of the costs of the RSRS facility is based upon recollections of consulting engineer David E. Aro. Aro claims that, during a tour of the pipeline, defendants stated that Ashley Creek would not be allowed to use the receiving station or any of its adjacent facilities. Instead, according to Aro, Ashley Creek would be required to install a valve in the pipeline to remove its slurry before the pipeline entered the receiving station. Consequently, Ashley Creek argues that it would not use the RSRS and should not pay for it. Thus, Ashley Creek removes the total cost of the RSRS ($1,591,902) from the investment base.

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[16] Bechtel Corporation completed a feasibility study in March 1984. Planning commenced in May 1984, and construction started in the summer of 1985. The first batch of slurry was shipped in May 1986.

Defendants maintain that the RSRS is an essential part of the pipeline used to deliver slurry to the shipper. Defendants state that the RSRS is part of the back pressure control facilities through which all phosphate slurry passes prior to exiting the pipeline. Defendants distinguish between the receiving station and shipper-owned facilities, such as storage tanks and settling ponds at the terminus of the pipeline, which are not part of the pipeline investment.

Ashley Creek has not shown that the pipeline could function without the RSRS. Ashley Creek's only evidence supporting the elimination of the costs, Aro's recollection of a discussion, is at odds with a quote used in the testimony of another of its witnesses.[17] The record indicates that the RSRS plays a part in the transmission of all slurry and, therefore, is an integral part of the pipeline. Thus, we include the RSRS construction costs in the SAPL's investment base.

b. Joint Construction Costs.

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[17] Opening verified statement of Elliot R. Travis, page 30. Witness Travis quotes the prepared direct testimony of defendants' witness Parham discussing how the operation of the pipeline would change if the throughput is increased:

> [T]he length of the water batch between slurry batches would be reduced as necessary up to a minimum of five minutes. Five minutes of water would place a 0.3 mile break between slurry batches, allowing the density meter at the Rock Springs terminal to sense the end of one batch and switch delivery points. (Emphasis added.)

The record reflects that certain construction costs were jointly incurred as Chevron simultaneously built the phosphate slurry pipeline and the Raven's Ridge $CO_2$ pipeline. These costs included environmental and surveying work, construction management and administration expenses, and right-of-way costs.

Defendants allocated these shared costs based on measured work content recorded during construction. Ashley Creek argues that these costs instead should have been allocated based on the ratio of each pipeline's construction costs to the combined cost for both pipelines. Based on those ratios, Ashley Creek states that the cost of building the $CO_2$ pipeline was 53.9% of the combined cost of the $CO_2$ and phosphate pipelines. Ashley Creek maintains that the phosphate pipeline's investment contains an over-allocation of the shared costs in the amount of $534,614.

We reject Ashley Creek's adjustment. Absent further evidence, the actual work content calculated at the time of construction would appear to provide the more precise basis for allocation.

2. Cost of Capital.

In its March 1992 decision (at 11), the ICC indicated that, absent better evidence, it would rely on Chevron's capital structure (debt/equity) and cost of capital to estimate the cost of capital for the SAPL. The parties present substantial evidence attempting to quantify the appropriate cost of capital for the SAPL.

a. Risk.

Ashley Creek relies on its estimate of Chevron's cost of equity to compute the cost of capital for the SAPL. Defendants, on the other hand, maintain that the construction and operation of a phosphate slurry pipeline is a risky venture and that investors would require a substantial risk premium before supplying capital for the SAPL. To account for this greater risk, defendants would add 200 basis points (or 2 percentage points) to Chevron's cost of debt and equity, and would increase the equity component of the SAPL's capital structure to 80% from Chevron's 70%.

Ashley Creek counters that the risk associated with a single-use project, such as a phosphate pipeline, would be shifted to the users of the project by using "take-or-pay" contracts.[18] Under this scenario, debt and equity investors would look to the creditworthiness of the shippers – defendants and Ashley Creek – rather than that of the SAPL.

Ashley Creek's theory is reasonable and unrebutted by the defendants. There is no question that a free-standing enterprise with heavy sunk costs in investment would involve substantial risk because those costs can be recovered only through use of the pipeline. Thus, to

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[18] Take-or-pay pipeline contracts are contractual commitments to use (take) a specified amount of capacity or, in the event the capacity is unused, pay the carrier for reserving that capacity. Ashley Creek's witness states that the lowest overall financing costs would be achieved using take-or-pay contacts. He also notes that Chevron's participation in this type of contract would shift the risk of the enterprise to Chevron.

decrease the cost of obtaining capital in the marketplace, an efficient new entrant would likely require the pipeline's users to enter into take-or-pay contracts prior to construction. The potential shippers' creditworthiness would then be assessed by the financial markets in determining the return required for capital investment.

While there is substantial evidence in the record concerning the creditworthiness of Chevron, there is none regarding the creditworthiness of Ashley Creek. We are thus left to assume that Chevron's creditworthiness is representative of the financial status of the shippers using the pipeline. This is a reasonable assumption to make in this case, and indeed one that the ICC announced that it would use in this case.[19] Because Chevron is a major shipper (and potentially the only shipper) in the SAC group, its cost of capital is indeed representative of what terms would be available in the financial markets for funds used to construct the SAPL.

b. Cost of Debt.

The parties agree to amortize the debt principal over the 20-year life of the pipeline. The parties also agree that Chevron has an Aa debt rating. Ashley Creek uses a 9.3% cost of debt based on the market value of Chevron's debt in May 1986. Defendants use a 9.8% cost of debt figure based on the market value of Chevron's debt in May 1989.

As discussed above, we base our analysis on the

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[19] See the ICC's corrected decision served March 30, 1992 at pages 11-12.

hypothetical SAPL starting up on December 1, 1986. Thus, we will use Ashley Creek's estimate of the cost of debt, because it better represents the cost of debt at the time the debt capital would have been raised to undertake the pipeline project.

c. Cost of Equity.

Both parties develop an estimate for the cost of equity based on the following formula:

$$k = \frac{D_1}{P_0} + g$$

where:

$k$ = Cost of equity
$D_1$ = dividends in time period 1
$P_0$ = stock price in time period 0
$g$ = expected long term growth in earnings per share

However, Ashley Creek's equity analysis is dynamic, looking at changes in the cost of equity for Chevron over the historic period (1986-1992), while defendants' analysis is static, based on 1989 data.

Ashley Creek computes Chevron's cost of equity for the period during which Chevron owned the pipeline. However, Ashley Creek was unable to do the same for SF Industries, for the period SF Industries owned the pipeline, because SF Industries is a privately held company for which no financial data are publicly available. Therefore, Ashley Creek applied the cost of equity of IMC Fertilizer, Inc. (IMC), as "the best and only

available proxy" for the last three quarters of 1992.

Ashley Creek estimated the growth in earnings using a weighted average of projected 5-year growth in cash flow (50%), projected 5-year growth in dividends (25%), and historical 10-year growth in dividends (25%). Ashley Creek's resulting estimate of the cost of equity for the period 1986-92 ranges from 10.91% to 13.31% for the historical dividend ($D_1$) data and 10.94% to 13.81% for the projected dividend data.

Ashley Creek suggests that, in some years, the spread between its calculated cost of equity and the 5-year Treasury bond yield is at the low end of the reasonable range and appears too volatile. To be conservative, Ashley Creek places a "spread floor" (lower limit) on the SAPL's annual cost of equity based on a 4.55 percentage point premium over the 5-year Treasury bond yields. Incorporating these two techniques to estimate the SAPL's equity cost, Ashley Creek develops annual estimates ranging from 11.29% to 13.79% for the period 1986 through 1992. It uses an average cost of equity of 12.75% for the period after 1992.

Defendants do not comment on complainant's estimation procedure, but rather calculate a single cost of equity for 1989 which they apply to the entire 20-year period. Defendants develop an expected dividend yield of 5.5% based on a dividend of \$2.85[20] and price of Chevron stock of \$52. Defendants start their growth analysis by looking at both 5- and 10-year historical

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[20] Defendants note that the 1989 edition of Value Line projected that Chevron would pay \$2.80 in dividends. Using this figure, they calculate an expected dividend yield of 5.38%.

growth rates for Chevron stock in earnings per share, dividends per share, net book value, and market price. They find that growth estimates range from negative 8.94% to a positive 7.6%. Defendants provide a second estimate of growth using an earnings retention model. This model yields an average implied growth in Chevron stock of 4.6%. Defendants' third (and preferred) approach to estimating growth is to survey investment advisory services and projections made by security analysis. These estimates range from 1% to 10.5% annual growth, depending on the basis of the projection (earnings, dividends, book value, or price).

Defendants discard all estimates of growth below 7% because those rates, when combined with Chevron's 5.5% expected dividend yield, suggest a cost of equity only 200 basis points above the May 1989 Aa yield on industrial bonds. Defendants assert that it is unrealistic to assume that investors in common stock would accept a return of less than 12%. They maintain that projected growth in market price and earnings provide the best guide as to growth[21] and judgmentally narrow their final estimate of growth to a range of 9% to 10%. When combined with their 5.5% expected dividend yield, this approach yields a cost of equity range of 14.5% to 15.5%.

To support this range, defendants perform a risk premium analysis.[22] Defendants note that the most

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[21] The Value Line estimates of earnings and price are 10.5% and 9.6%, respectively. The growth estimate in earnings from Institutional Brokers Estimate System (IBES) is 8%.

[22] A risk premium analysis estimates the cost of equity by adding to observable bond returns the additional return an equity holder

frequently cited study of risk premiums in the regulatory arena is Ibbotson and Sinquefield's Stocks, Bond, Bills and Inflation; Historical Returns (1926-1986), (SBBI). Based on an analysis of Chevron's risk in relation to the rest of the market and SBBI's risk premium range for the period 1926 through 1986, defendants arrive at a cost of equity of 15.13%. Defendants assert that the cost of equity derived from the formula and risk premium analysis agree, and their best estimate of an equity cost for Chevron is 15.25%.

Ashley Creek contends that defendants' analysis of Chevron's cost of capital is one-sided because it selectively eliminates from consideration all but the highest measures of growth. Ashley Creek also contends that defendants' risk premium analysis is defective.[23] It maintains that an appropriately applied analysis of risk premium using SBBI data yields a range from 1.99% to 4.07%, with the average being 3.17%. Ashley Creek avers that application of these risk premiums for the period 1986 through 1992 yields an equity cost ranging from 10.3% to 12.1%.

We agree with Ashley Creek's criticisms of defendants' cost of equity evidence. Defendants'

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would require to hold the stock instead of the bond. The difference between the two returns is known as the risk premium, which has been estimated in several academic studies to range between 5.5% and 8.3%.

[23] Ashley Creek criticizes (1) the method of calculating the risk premium itself; (2) the use of the average of an arithmetic and geometric mean; and (3) the use of SBBI data from 1926-1987 rather than a more relevant time period.

discounted cash flow (DCF) analysis (see n. 33, infra) of the cost of equity is biased in estimating the growth in Chevron's earnings.[24] It also improperly disregards relevant financial data as implausible simply because it produces a cost of equity only 200 basis points above corporate Aa bonds. Furthermore, defendants present a single point (1989) estimate of Chevron's cost of equity, a procedure we have rejected in other cases as less reliable than estimates based on multiple years of data.[25]

Because Ashley Creek's estimates span a longer time horizon and present a more accurate estimate of the return than would be expected by investors in the capital markets during the period, we accept Ashley Creek's estimates of the return equity investors in the SAPL would require for use of their capital.

d. Capital Structure.

The parties agree to hold the capital structure of the

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[24] Defendants' evidence shows that they reviewed data on earnings growth from IBES. (The Board uses IBES data to determine the cost of equity for rail carriers.) IBES estimated Chevron's earnings growth at 8%, but defendants chose to give no weight to any evidence which produced a cost of equity below 14.5%. Application of the IBES growth rate to defendants' expected dividend yield of 5.5% results in a cost of equity of 13.5%, which is close to Ashley Creek's estimate of 12.99% for the same year. Use of the 5.38% expected dividend yield from Value Line's estimate of dividends brings the two estimates even closer (i.e., 12.99% and 13.38%)

[25] See, e.g., West Texas Util. v. Burlington N.R.R., No. 41191, slip op. at 71, (STB served May 3, 1996).

SAPL static over the 20-year analysis period. Defendants assert that Chevron's capital structure in 1989 was 30% debt and 70% equity, but as noted earlier, defendants use a 20/80 capital structure mix to shift greater risk in the venture onto the equity investors. Ashley Creek computes Chevron's market value capital structure based on 1986 data, calculating a capital structure of 36% debt and 64% equity.

Ashley Creek's ratio more closely correlates to the time period the SAPL would have raised debt and equity capital to finance the pipeline. It is thus a better estimate of the capital structure which the SAPL would incur than Chevron's 1989 structure. Therefore, we will use Ashley Creek's estimated 36/64 debt/equity capital structure mix to calculate a cost of capital for the SAPL.

e. Interest During Construction.

The parties calculate interest during construction by applying the SAPL's cost of capital to the construction cost of the pipeline for one year. We use the same method to calculate interest during construction.

Ashley Creek's ratio more closely correlates to the time period the SAPL would have raised debt and equity capital to finance the pipeline. It is thus a better estimate of the capital structure which the SAPL would incur than Chevron's 1989 structure. Therefore, we will use Ashley Creek's estimated 36/64 debt/equity capital structure mix to calculate a cost of capital for the SAPL.

3. Operating Expense.

The parties separate operating expenses into two general categories, fixed and variable.[26] Because we are evaluating the reasonableness of tariff rates that vary with traffic volumes, we must account for changes in operating costs caused by changes in volume shipped.[27]

Ashley Creek notes that operating costs can vary significantly from year to year. In its presentation, Ashley Creek levelizes all components of operating expenses to smooth the fluctuation in historic annual operating expenses. After adjusting for inflation, levelization distributes operating expenses evenly over the life of the SAPL. Complainant asserts that this levelization encourages efficient management.

The ICC's March 1992 decision (at 11) permitted complainant to address the efficiency of the pipeline's operations. However, Ashley Creek has not shown how the pipeline could operate more efficiently and thus reduce expenses. Furthermore, its argument that

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[26] The parties agree that all of the operating expense accounts, other than accounts 310 (Materials - Supplies and Expenses) and 330 (Operations - Fuel and Power), are fixed and do not vary with pipeline output. The expenses associated with Accounts 310 and 330 do vary with volume. Account 310 accumulates the cost of the electricity required to operate the pipeline's pumping facilities. Account 330 accumulates the cost of supplies expended in the operation of the pipeline.

[27] The parties use the historic operating expense of the pipeline as starting point for their variable operating expense formulas. However, because historic operating costs reflect operations at only one level of production, the parties' formulas calculate variable expenses in order to reflect the costs of operating the pipeline at various proposed throughput levels.

levelization encourages efficient management is unsupported. The levelization of operating expense is simply a mathematical exercise to evenly distribute volatile annual operating costs (which Ashley Creek has not shown were incurred as the result of inefficient operation) over the 20-year period.

Because Ashley Creek has not shown that the annual fluctuations in CPL's actually-incurred operating expenses were the result of inefficient operation, we reject Ashley Creek's levelization procedure.

We discuss each category of operating expense below.

a. Fixed Costs.

The parties agree that the pipeline's historical fixed costs[28] reflect the costs that would have been incurred by the SAPL for the known period. As noted above, Ashley Creek develops a levelized annual cost for each component of operating cost for both the historic and forecast periods. Defendants use the historic costs for

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[28] Fixed operating expenses fall into several broad categories. They are: compensation for employees; payments to outside contractors for services; certain materials and supplies accounts (maintenance and general); and a general category that includes accounts for taxes, property insurance, and rentals.

Defendants only submitted operating expense evidence for the years 1989 forward. The only evidence on actual expenses pre-1989 was submitted by Ashley Creek. Thus, we use Ashley Creek's actual operating costs for 1986 and 1987. Ashley Creek asserts that it was not able to obtain actual 1988 costs from defendants. For 1988 operating costs, we use the average of 1987 and 1989 through 1993 costs.

that period, and the cost incurred by the pipeline in the first quarter of 1994 to develop an estimate of future costs.

Because we rejected Ashley Creek's levelization of operating cost, we accept defendants' use of historic fixed cost[29] and its estimate ($158,078 per month) for future time periods.

b. Fuel and Power.

The cost of electricity is a significant expense for the pipeline. Electricity powers the pumps used to move the slurry through the pipeline. Ashley Creek and defendants agree that historic electric expense can be used to estimate the electricity costs that the SAPL would incur to move various levels of throughput.[30]

Defendants disagree with Ashley's Creek's estimates

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[29] For certain years, the parties report slightly different historical operating expenses, e.g., for 1990 Ashley Creek's report $2,960,358 while defendants report $2,960,258. Because the differences between the parties is inconsequential and has no impact on the outcome of this proceeding, for administrative convenience we use the defendants evidence for historical operating expenses for the post-1988 period.

[30] Ashley Creek claims that electric expense is made up of a fixed and a variable portion. Ashley Creek's two-part tariff would divide any fixed electrical expense on the basis of each shipper's nominated capacity requirement. The variable portion would be assigned based on volume shipped. Because we are addressing the reasonableness of the defendants' rates and not Ashley's Creek's proposed two-part tariff, we need not address Ashley's Creek's division of electric expense into fixed and variable components.

of electric expense at higher volumes, maintaining that several errors have been made.[31] Defendants estimate a base electric expense predicated on the expense that would be incurred if only water were moved through the pipeline. Defendants' model contains an incremental cost to account for the additional cost of moving a ton of higher viscosity slurry rather than water.

In addition to the valid criticisms raised by defendants, Ashley Creek's method of estimating this operating expense allocates fixed electric expense based on its proposed two-part tariff. However, as noted above, we are not addressing Ashley Creek's two-part tariff structure. Furthermore, we have rejected complainant's levelization procedure and, thus, the distribution of cost it produces.

For these reasons, we accept defendants' method of estimating Fuel and Power expense. It appropriately permits the total electricity costs to rise to reflect increases in throughput. Defendants' 1994 costs

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[31] Defendants maintain that Ashley Creek relied only on the rate information for the Utah Power and Light Company but that electricity is also supplied to the pipeline by Pacific Power and Light. They claim that, to the extent the rates charged by the two utilities differ, Ashley Creek's analysis is invalid.

Defendants also assert that Ashley Creek uses only 1991 data to determine electric costs and, more significantly, calculates fixed costs based on the daily power requirement (kilowatts) to move 2.885 million tons annually but calculates the variable portion based on a throughput of 765,000 tons. Defendants content that Ashley Creek failed to consider the increased variable electricity costs due to the higher viscosity of slurry as opposed to water.

demonstrate this effect. They include a minimum $55,882 monthly charge for electricity, which is equivalent to a charge for pumping water. As the pipeline starts to ship phosphate, the cost of electricity increases incrementally by $0.075 for each ton of phosphate transported, the difference in electricity costs to pump slurry rather than water. At the pipeline's maximum monthly throughput, total electricity costs rise to approximately $73,000.

c. Maintenance - Supplied and Expenses

The parties agree that the costs of supplies needed to maintain the pipeline are directly variable with the level of throughput (a constant unit cost applied at all throughput). Ashley Creek estimates a levelized cost of $0.5602 per ton (1986 dollars).[32] Defendants use actual historical costs to determine a cost per ton for each year from June 1989 through 1994. Defendants' estimate of future cost ($0.3331 per ton) is based on 1st quarter 1994 cost.

As noted above, Ashley Creek's levelization of operating costs is unacceptable. Consequently, we will use defendants' method of estimating the costs of supplies at other volume levels.

4. Discounted Cash Flow Analysis

The revenue flow required to cover the total cost of

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[32] Actual supply and expense costs vary substantially – from $0.18 per ton in 1986 to $0.98 per ton in 1991, to $0.26 per ton in 1993.

the SAPL is calculated using a DCF analysis.[33] This model requires five basic inputs: (1) the investment in the pipeline; (2) a cost of capital; (3) the cost of operating the enterprise; (4) the impact of applicable Federal and state taxes on the earnings of the enterprise and (5) inflation rates in asset prices and other inputs necessary to operate the enterprise. The first three inputs are discussed above. The last two items, as well as a discussion of the parties' comments on the time pattern of recovery, are discussed below.[34]

d. Time Pattern of Recovery.

The parties disagree on when the capital costs of building the pipeline should be deemed to be recovered over the 20-year period of the SAPL. While capital costs are incurred entirely at the outset (in the construction phase) the recovery of those costs can be assigned in various ways. For example, they can be assigned at a constant rate in nominal terms (as with a level-dollar amortized mortgage), or at a constant rate in real terms (i.e. the nominal rate is adjusted for inflation in asset values), or using an OCR method (i.e. applying a nominal cost of capital to a depreciating investment base),

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[33] The term DCF is used here to describe both the discounting of monies to a single time period (its normal connotation) and the development of future expense levels and return on, and of, capital investment.

[34] As previously noted, Ashley Creek presents maximum rate evidence based on a DCF model that creates a two-part tariff. We will not address that portion of Ashley Creek's DCF model that deals with the allocation of the required revenue flow between Ashley Creek and the other shipper on the line.

resulting in a declining capital recovery pattern. The time pattern of recovery that we select for the SAPL analysis is important because it affects the assignment of the revenue requirement at different times in the life cycle of the SAPL. That, in turn, affects the ultimate calculation of the cumulative over-or under-recovery of the pipeline's SAC. This is because overpayments (or shortfalls) of revenues are determined on a monthly basis, by subtracting the required revenue flow (recovery of capital and operating cost) from the revenues derived from the tariffs. When the present value of the sum of these overpayments and shortfalls is positive, the rate structure permits recovery of excess revenues (which indicated that the rate structure is unreasonable). Thus, the assumptions used as to the expected time pattern of capital recovery can impact this so-called "netting" calculation.

In this case, Ashley Creek employs a constant capital recovery rate in real terms. In other terms, under Ashley Creek's approach, the recovery of capital investment would increase with inflation in the value of the assets over the 20-year analysis period. In contrast, defendants apply a declining capital recovery pattern, based on their projection of a declining market for the pipeline's service.[35] Defendants argue that capital cost recovery would thus need to be higher in the early years to make up for the pipeline's inability to charge as high a rate in

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[35] Defendants equate the market for phosphate fertilizer (the end product produced from the phosphate rock transported by the pipeline) with the market for the pipeline's service. Defendants presented evidence to show that the price for phosphate fertilizer declined at a 4% nominal rate, or an 8% real rate, from 1980 through 1993.

later years.

For purposes of our SAC analysis, it does not matter whether the market for the pipeline's services would decline over the period of the SAPL, increase over that time, or fluctuate. We assume a level rate per ton in real terms. See Bituminous Coal-Hiawatha, UT to Moapa, NV, 10 I.C.C.2d 259, 277 n.29. That is because, by design, a SAC analysis assumes that there are no barriers to entry or exit and that the market is thus contestable. Accordingly, if the revenues generated were higher than the revenues needed, a competitor would enter the market and undercut the SAPL. Alternatively, if the revenues generated were lower than the revenues needed, the SAPL would exit the market.[36] Therefore, for purposes of the SAC analysis, the SAPL rates must be set to exactly match the revenue needs of the SAPL (i.e., the SAC costs).

In a contestable market, the defendants' declining capital recovery pattern would not be sustainable because the higher rates it would permit in the early years would encourage entry by a competing service offering lower rates (in the absence of barriers to entry and exit). This prospect would drive the rates down to the level that

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[36] Contestable market theory would allow instantaneous exit and reentry. However, our SAC constraint does not assume such intermediate exit and reentry activity for the SAC carrier. Rather, it judges the financial decision to enter the market by the final outcome at the end of the forecasted SAC period (in this case, 20 years). The purpose of this hypothetical exercise is to determine if the SAC carrier could provide the service over the course of the forecasted SAC period at rates below those charged by the defendants.

could not be undercut by another carrier - a level rate in real terms. The resulting constant recovery in real terms is the pattern of capital cost recovery that is normally established in competitive markets and is appropriate for use in a contestable market.

b. Impact of Tax Liability on Capital Payments

The Federal and state taxes that would be incurred as a result of doing business are included in the SAC analysis. Tax liabilities are taken into account by incorporating in the DCF model the applicable Federal and state tax rates, permissible depreciation schedules, investment tax credits and the reduction in Federal tax liability for state taxes paid. Both parties have presented evidence on these matters, and the parties' different starting points for the analysis (1986 or 1989) have a significant impact on the taxes the SAPL will face.

i. Investment Tax Credit. As discussed earlier defendants assume that the SAPL was placed in service in 1989 and that, accordingly, tax laws during that period would govern the pipeline's tax liability. Ashley Creek maintains that the pipeline began to provide service in 1986 and that the tax code applicable to that time period should be used to determine the SAPL's tax liability.[37]

Because we start the SAC service period from the date

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[37] Tax laws were changed with the passage of the 1986 Tax Reform Act. However, Ashley Creek argues that, just as Chevron did, the SAPL would have signed a written contract prior to December 31, 1985, for construction of the pipeline, thus permitting it to qualify under transition provisions available in the 1986 act.

the initial complaint was filed, we apply as the applicable tax laws those that would have been available to the SAPL in December 1986. We agree that, by signing a contract for construction prior to the end of 1985, the SAPL would have been able to take advantage of the transition rules in the tax code, just as Chevron presumable did when it constructed its pipeline. These transition rules permit certain pipeline assets to qualify for a 10% investment tax credit. Furthermore, because the hypothetical pipeline would have been placed into service prior to January 1, 1987, its assets would have qualified for depreciation under the Accelerated Cost Recovery System. Under this depreciation method, the pipeline assets would have been depreciated for tax purposes over a 5-year period.

ii. Tax Shelter Flow-through to Parent Corporation.

Ashley Creek acknowledges that the tax benefits arising from investment in the SAPL should not be permitted to flow to a parent corporation.[38] Nevertheless, in its presentation, it argues that the SAPL would pass the tax benefits onto a corporate parent because it believes that CPL did so.[39] However, our SAC procedures do not permit the passage of tax benefits onto a corporate parent.[40] The SAC test, a test of rate reasonableness,

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38 See Rebuttal of Complainant Ashley Creek Phosphate Company, Volume II, R.V.S. of Elliot R. Travis and Steven R. Bateson, at 12.

39 Ashley Creek asserts that it cannot prove that CPL shared its tax benefits with Chevron because it has been refused discovery on this issue.

40 See Bituminous Coal–Hiawatha, UT. to Moapa, NV, 6 I.C.C.2d

measures the cost of an efficient competitor, not that of an efficient competitor and its corporate parent combined. Thus, our DCF model does not assume that the SAPL would pass tax benefits onto a corporate parent, although it does permit the SAPL to pass on available tax savings to its shippers in the form of lower rates.

iii. Federal and State Tax Rates. Defendants object to other tax aspects of Ashley Creek's presentation as well. Ashley Creek's presentation assumes that the SAPL would pay state tax on all earnings. Defendants note that half of the pipeline's earned income would be generated in Wyoming, where there are no state income taxes.

Defendants also argue that complainant's state tax calculation leads to a double count of income tax credits in the pipeline's early years. Finally, defendants maintain that Ashley Creek used the wrong Federal statutory tax rate for 1987.

Our restated DCF model reflects that Wyoming has

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1, 74 (1989):

> The purpose of the SAC test is to determine the costs which an efficient competitor would face if it entered the transportation industry and competed with the incumbent for a defined group of traffic. The resultant costs and estimated maximum rates should reflect only the economic costs of the hypothetical (stand-alone railroad) and should not be influenced by an assumed parent corporation. Recognizing the financial condition of the parent corporation in the calculation of SAC would incorrectly change the test to one which measures the relative merits of different corporate owners.

no state income tax. Further, we ensure that there is no double count of income tax credits, and use a Federal statutory tax rate for 1987 of 40% in recognition of the different rates applicable during that year.

c. Inflation in Asset Prices and Operating Costs.

Ashley Creek estimates inflation in the value of the pipeline assets based on a weighted average of the initial cost of each asset. Defendants present no evidence on the inflation in asset prices.[41] Defendants agree to use Ashley Creek's weighted indices for estimating inflation in operating costs.

We accept the parties' use of a common inflation index for operating expenses. We use Ashley Creek's estimate of inflation in pipeline assets, as it is the only evidence on future inflation in asset prices.

d. Disposal of Unconsumed Assets (Salvage).

Ashley Creek's presentation includes a calculation of both the costs that would be expended and those that would be recouped by closing the pipeline at the end of its (20-year) life. In its analysis, Ashley Creek accepts defendants' proposal to set aside funds to defray the cost of closing the pipeline. It agrees that this is a legitimate business cost, and calculates the present value of that cash flow and adds it to the total investment that must be recovered over 20 years. Inclusion of these monies in the

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[41] Defendants assume that the market for phosphate and phosphate fertilizer declines by 8% annually. They use this assumption in their DCF model to determine the time pattern of recovery of capital costs, rather than inflation in asset prices.

investment base would permit accumulation of sufficient funds to pay the cost of abandoning the pipeline in the year 2006.

Complainant also asserts that a substantial number of the assets have service lives greater than 20 years and would have a salvageable value at the end of the pipeline's life. These assets fall into four general categories; land; communications equipment; buildings; and other station equipment, including controls, piping, and electrical equipment. Ashley Creek calculates a residual value for these assets by computing the future value of each asset at the end of 20 years, depreciating that value using the asset's service life and straight line depreciation, and taxing the remaining value at the end of 20 years using an estimate of the appropriate state and Federal tax rates. Ashley Creek's resulting adjustment to the SAPL investment base in shown in the following table.

Ashley Creek Adjustments to Start-up Investment

| | |
|---|---|
| Start-up Investment | $32,871,254 |
| Interest During Construction | $2,800.631 |
| Subsequent Additions | $0 |
| Unconsumed Assets at End of Recovery Period | ($473,741) |
| Abandonment Costs | $394,317 |
| Total | $35,592,461 |

The parties do not address the linkage between the abandonment costs and salvage value of any unconsumed assets. We assume that monies set aside for abandonment of the pipeline permit the salvage of any saleable assets. Because it is reasonably to assume that unconsumed assets will have some value and defendants do not discuss abandonment cost or support their zero salvage value, we accept Ashley Creek's treatment of abandonment cost and salvage of unconsumed assets. We note that the net affect of assuming some value from salvaged assets and abandonment cost is minimal and results in only a small offset to the capital investment to be recovered through the rates charged.

5. Revenues.

Having determined the costs of constructing and operating the SAPL, we now consider the revenues that would be available to the SAPL under the defendants' rate structure.

a. Tariff Rates.

The defendants' tariffs assess a specified rate for shipping a certain monthly volume. The following tables show the monthly revenues that would be produced by moving various volumes under the tariffs.

Tariff I.C.C. CHVP No. 1
Effective 6-20-89 to 8-14-91

| Monthly Volume (tons of concentrate) | | | Monthly Revenue | |
|---|---|---|---|---|
| From | To | Rate | From | To |
| 0 | 42,000 | $21.60 | $0 | $907,200 |
| 42,001 | 62,500 | 15.60 | 655,216 | 975,000 |
| 62,501 | 84,000 | 11.70 | 731,262 | 983,800 |
| 84,001 | 104,000 | 9.75 | 819,010 | 1,014,000 |
| 104,001 | 125,000 | 8.45 | 878,808 | 1,056,250 |
| 125,001 | 160,000 | 7.50 | 937,508 | 1,200,000 |
| 160,001 | 241,677 | 7.00 | 1,120,000 | 1,691,667 |

Tariff I.C.C. CHVP No. 2
Effective 8-15-91 to 2-27-92

| Monthly Volume (tons of concentrate) | | | Monthly Revenue | |
|---|---|---|---|---|
| From | To | Rate | From | To |
| 0 | 42,000 | $21.00 | $0 | $882,000 |
| 42,001 | 62,500 | 14.95 | 627,915 | 934,375 |
| 62,501 | 84,000 | 11.10 | 693,761 | 932,400 |
| 84,001 | 104,000 | 9.15 | 768,609 | 951,600 |
| 104,001 | 125,000 | 7.85 | 816,408 | 981,250 |
| 125,001 | 160,000 | 6.80 | 850,007 | 1,088,000 |
| 160,001 | 200,000 | 5.35 | 856,005 | 1,070,000 |
| 200,001 | 234,000 | 4.70 | 940,005 | 1,099,800 |

[42] The CPL tariff was adopted by SFPL November 4, 1992, as tariff I.C.C. SFIP No. 1.

Tariff I.C.C. CHVP No. 3
Effective 2-28-92 to present[42]

| Monthly Volume (tons of concentrate) | | | Monthly Revenue | |
|---|---|---|---|---|
| From | To | Rate | From | To |
| 0 | 42,000 | $19.75 | $0 | $829,500 |
| 42,001 | 62,500 | 14.00 | 588,014 | 875,000 |
| 62,501 | 84,000 | 10.15 | 634,385 | 852,600 |
| 84,001 | 104,000 | 8.30 | 697,208 | 863,200 |
| 104,001 | 125,000 | 7.00 | 728,007 | 875,000 |
| 125,001 | 160,000 | 5.95 | 743,756 | 952,000 |
| 160,001 | 200,000 | 4.60 | 736,005 | 920,000 |
| 200,001 | 234,000 | 4.00 | 800,004 | 936,000 |

The potential revenues that the pipeline could generate from June 20, 1989, until the end of the 20-year analysis period can be developed by multiplying the various monthly volumes by the rate established for each level of throughput. The parties present five different estimates of the monthly volumes the SAP would move during its life.[43] We find it necessary to test only

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[43] Ashley Creek presents two and defendants present three different volume scenarios. Ashley Creek's primary volume scenario assumes that each shipper will use its entire reserved capacity (1.085 million tons for Ashley Creek, and 1.8 million tons for defendants). Its alternative volume scenario assumes only that defendants will ship 1.8 million tons of throughput--the volume Chevron originally desired to transport on an annual basis.

defendants' two primary volume scenarios. We do not need to test defendants' third volume scenario or Ashley Creek's scenarios, which assume constant monthly volumes of 173,750, 150,000, and 240,000 tons. Our analyses using static monthly volume in the appropriate rate/volume range yield the same results we would have reached as if we had applied these scenarios.

5. Pre-June 20, 1989 Rates.

Because our SAC analysis begins before the tariff was actually published, we must also determine what revenue contribution to attribute to the SAPL for the pre-tariff period from December 1, 1986, to June 19, 1989. Ashley Creek asserts that the pipeline's actual revenues, which are reflected in corporate transfers between the shipper and its pipeline sibling, should be used to determine the total revenue flow for the pre-June 20, 1989 period.[44] However, we do not believe the corporate bookkeeping transactions between the Chevron shipper and the pipeline are germane to the question of the

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Defendants, on the other hand, use the actual volumes transported for the historic period and an average of those volumes for the forecast period. They present an alternative scenario that adds Ashley Creek's reserved capacity of 1.085 million tons to the actual volumes shipped over the historic period and the projected volumes for the forecast period. Their third scenario assumes that defendants' ship 1 million tons annually while Ashley Creek ships 1.085 million tons annually.

[44] Complainant asserts that the pipeline was paid $22.57 per ton of throughput from the inception of service in April 1986 through the end of 1987. It further asserts that from the beginning of 1988 until the effective date of the initial tariff, the pipeline's records indicate that it earned a rate of $18.32 per ton.

reasonableness of the tariff rates – the question that the referring court has asked us to address. Those revenue transfers were established to maximize the profit level of the combined corporate entities. They were not necessarily representative of the rates which would have been charged to an independent (unaffiliated) shipper. Rather, we believe that the rates contained in the first tariff are the best measure of the rates which would have been charged prior to June 20, 1989, because CPL set those rates based on the possibility that a non-affiliated shipper might request service. Therefore, in evaluating the reasonableness of the tariffs, we will assume that the somewhat lower rates published on June 20, 1989 would have been applicable if the tariff had been filed in 1986.

6. Results of Our Rate Reasonableness Analysis.

The final step in our analysis is to compare the revenue needs of the hypothetical SAPL to the revenues that would be generated by the challenged tariff rates. A monthly comparison is necessary because the tariff rates are dependent on total monthly volumes.[45] Our analysis thus compares the costs and revenues on a monthly basis to determine the overpayments or shortfalls in revenues. By summing the present value (in December 1986 dollars) of all monthly overpayments and shortfalls over the 20-year SAPL period, reasonableness can be determined. If a cumulative overpayment exists, the

[45] The monthly volumes shipped by CPL varied substantially from 1986 through 1993. The minimum monthly volume shipped during that period was 16,383 while the maximum shipped was 92,298. Thus, only the first four rate/volume ranges in the tariffs have actually been used.

tariff rates are unreasonable to the extent that they result in greater recovery than needed based on the SAPL costs.

Potentially, there are an almost infinite number of combinations of monthly volume levels that could flow through the pipeline. It would not be practical to attempt to analyze all of the possible volume combinations. Therefore, we have evaluated the reasonableness of each rate/volume category by determining the constant monthly volume at which the revenues produced from the tariff rates would just equal the full SAC costs of the SAPL. See Appendix Tables 1-8. By so doing, we are able to conclude at what point revenues would exceed costs within each volume range, and thus when the rate charged under the tariff would be reasonable.

In the range of 0 to 42,000 tons shipped per month, the defendants' rate would become unreasonable when phosphate shipments reach a constant monthly level of 34,112 tons. In the 42,001 to 62,500 ton range, the rate would become unreasonable when constant monthly shipments exceed 48,315 tons. For the 62,501 to 84,000 ton range, constant monthly shipments above 66,580 tons would cause the defendants' rate to become unreasonable. In all constant volume ranges above 84,000 tons, the defendants' rate levels would be unreasonable.

This analysis of the defendants' tariff rates indicates that the rates are unreasonable for shipments at many volume levels. However, there may be certain shipping patterns where the tariff rate structure would be reasonable. We cannot know what the actual volume levels will be in the future, or what they would have been in the past if Ashley Creek had been using the pipeline.

However, in evaluating the reasonableness of the tariff rates we have constructed two possible scenarios.

One reflects the amount the defendants have shipped and expect to ship through the pipeline over its 20-year-life. In other words, it assumes that the total amount of phosphate to be shipped is determined by the actual demand for phosphate in the market and, thus, would be the same amount whether shipped by defendants, Ashley Creek, or some combination of the two. Under this assumption, we determine that the net present value of the revenues exceeds costs by approximately $1.7 million. See Appendix Table 9.

The second scenario, which we find intuitively less compelling, assumes that the potential demand for phosphate exceeds the quantities actually shipped; it utilizes the sum of the full traffic projections of both the defendants and Ashley Creek beginning in 1986.[46] With the inclusion of both the defendants' and Ashley Creek's tonnages, the tariff rates would generate excess revenues of over $21 million. See Appendix Table 10.

On the record developed in this proceeding, we are unable to determine the size of the phosphate market, nor can we evaluate whether Ashley Creek has the ability to

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[46] Defendants argue that the market for phosphate is limited, and that any phosphate moved by Ashley Creek would displace phosphate shipments by defendants. Indeed, one would expect that if the market could have accommodated the additional shipments that Ashley Creek contends it could move, the defendants would have exploited that demand, at least prior to the time Ashley Creek was in a position top mine and ship phosphate.

serve that market.[47] Rather, it is for the court in the underlying antitrust action to determine whether Ashley Creek was ever in a position to market phosphate, or will be in the future, and to determine the size of the potential; market for phosphate that could be delivered by this pipeline. It may be that the court will conclude that one of our other volume usage scenarios – or, indeed, a scenario that we did not even consider at all – is more useful for purposes of the antitrust litigation. Our role is simply to assist the court by presenting a framework for addressing the narrow issue that is subject to our primary jurisdiction.

We find:

Defendants' subject tariffs covering the transportation of phosphate slurry from Vernal, UT, to Rock Springs, WY, are unreasonable to the extent discussed in this decision.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Defendants' motion for leave to file a motion to strike, filed June 22, 1995, is denied.

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[47] Defendants allege that Ashley Creek has never received a permit from the State of Utah to mine phosphate and, that it is questionable whether it will ever even be in a position to move any traffic.

2. Ashley Creek's motion to strike, filed July 5, 1995, is denied.

3. This proceeding is discontinued.

4. A copy of this decision will be mailed to:

The Honorable David Sam
United States District Court for the
District of Utah, Central Division
150 U.S. Courthouse
350 South Main Street
Salt Lake City, UT 84101

Re: Case No. 89-C-554-S

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen.

Vernon A. Williams
Secretary

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen.

Vernon A. Williams
Secretary

Appendix

Table 1

RATE REASONABLENESS ANALYSIS
Tariff Rate Levels for 0 - 42,000 Tons Per Month
(Based on Breakeven Volume of 34,112 Tons)

| Year | Total Cost ($000) | Total Revenue ($000) | Net Overpayment or Shortfall ($000) | Present Value Overpayment or Shortfall ($000) | Cumulative Present Value Overpayment or Shortfall ($000) |
|---|---|---|---|---|---|
| 1986 | 455 | 737 | 282 | 279 | 279 |
| 1987 | 7,193 | 8,842 | 1,649 | 1,542 | 1,821 |
| 1988 | 7,501 | 8,842 | 1,341 | 1,126 | 2,948 |
| 1989 | 7,356 | 8,842 | 1,486 | 1,118 | 4,066 |
| 1990 | 7,841 | 8,842 | 1,000 | 669 | 4,735 |
| 1991 | 8,480 | 8,749 | 269 | 161 | 4,896 |
| 1992 | 8,299 | 8,167 | (132) | (67) | 4,829 |
| 1993 | 8,193 | 8,085 | (109) | (50) | 4,779 |
| 1994 | 8,379 | 8,085 | (294) | (122) | 4,657 |
| 1995 | 8,651 | 8,085 | (566) | (209) | 4,448 |
| 1996 | 8,929 | 8,085 | (844) | (278) | 4,170 |
| 1997 | 9,216 | 8,085 | (1,131) | (332) | 3,838 |
| 1998 | 9,513 | 8,085 | (1,428) | (374) | 3,465 |
| 1999 | 9,820 | 8,085 | (1,735) | (405) | 3,060 |
| 2000 | 10,137 | 8,085 | (2,053) | (426) | 2,633 |
| 2001 | 10,465 | 8,085 | (2,381) | (441) | 2,193 |
| 2002 | 10,804 | 8,085 | (2,719) | (449) | 1,744 |
| 2003 | 11,154 | 8,085 | (3,070) | (451) | 1,293 |
| 2004 | 11,516 | 8,085 | (3,432) | (449) | 844 |
| 2005 | 11,891 | 8,085 | (3,806) | (444) | 399 |
| 2006 | 12,235 | 7,411 | (3,824) | (399) | 0 |



00029

BEST AVAILABLE COPY

Table 2

RATE REASONABLENESS ANALYSIS
Tariff Rate Levels for 42,000 - 62,500 Tons Per Month
(Based on Breakeven Volume of 48,315 Tons)

| Year | Total Cost ($000) | Total Revenue ($000) | Net Overpayment or Shortfall ($000) | Present Value Overpayment or Shortfall ($000) | Cumulative Present Value Overpayment or Shortfall ($000) |
|---|---|---|---|---|---|
| 1986 | 460 | 754 | 294 | 291 | 291 |
| 1987 | 7,333 | 9,044 | 1,712 | 1,601 | 1,892 |
| 1988 | 7,627 | 9,044 | 1,418 | 1,191 | 3,083 |
| 1989 | 7,506 | 9,044 | 1,538 | 1,157 | 4,240 |
| 1990 | 7,993 | 9,044 | 1,051 | 703 | 4,943 |
| 1991 | 8,658 | 8,902 | 244 | 147 | 5,090 |
| 1992 | 8,417 | 8,205 | (211) | (108) | 4,982 |
| 1993 | 8,253 | 8,117 | (136) | (63) | 4,919 |
| 1994 | 8,448 | 8,117 | (331) | (137) | 4,782 |
| 1995 | 8,722 | 8,117 | (605) | (224) | 4,559 |
| 1996 | 9,002 | 8,117 | (885) | (292) | 4,267 |
| 1997 | 9,292 | 8,117 | (1,175) | (345) | 3,922 |
| 1998 | 9,591 | 8,117 | (1,474) | (386) | 3,536 |
| 1999 | 9,900 | 8,117 | (1,784) | (416) | 3,120 |
| 2000 | 10,220 | 8,117 | (2,103) | (437) | 2,683 |
| 2001 | 10,551 | 8,117 | (2,434) | (451) | 2,233 |
| 2002 | 10,892 | 8,117 | (2,775) | (458) | 1,775 |
| 2003 | 11,245 | 8,117 | (3,128) | (460) | 1,315 |
| 2004 | 11,610 | 8,117 | (3,493) | (457) | 858 |
| 2005 | 11,987 | 8,117 | (3,870) | (452) | 406 |
| 2006 | 11,326 | 7,440 | (3,885) | (406) | 0 |



000298

Table 3

RATE REASONABLENESS ANALYSIS
Tariff Rate Levels for 62,501 - 84,000 Tons Per Month
(Based on Breakeven Volume of 66,580 Tons)

| Year | Total Cost ($000) | Total Revenue ($000) | Net Overpayment or Shortfall ($000) | Present Value Overpayment or Shortfall ($000) | Cumulative Present Value Overpayment or Shortfall ($000) |
|---|---|---|---|---|---|
| 1986 | 466 | 779 | 313 | 310 | 310 |
| 1987 | 7,513 | 9,348 | 1,835 | 1,716 | 2,026 |
| 1988 | 7,789 | 9,348 | 1,559 | 1,309 | 3,335 |
| 1989 | 7,700 | 9,348 | 1,648 | 1,240 | 4,575 |
| 1990 | 8,188 | 9,348 | 1,160 | 775 | 5,350 |
| 1991 | 8,886 | 9,166 | 280 | 169 | 5,519 |
| 1992 | 8,569 | 8,232 | (337) | (173) | 5,347 |
| 1993 | 8,331 | 8,109 | (221) | (103) | 5,244 |
| 1994 | 8,538 | 8,109 | (428) | (177) | 5,067 |
| 1995 | 8,814 | 8,109 | (705) | (260) | 4,806 |
| 1996 | 9,097 | 8,109 | (988) | (325) | 4,481 |
| 1997 | 9,390 | 8,109 | (1,280) | (376) | 4,105 |
| 1998 | 9,692 | 8,109 | (1,582) | (414) | 3,691 |
| 1999 | 10,004 | 8,109 | (1,895) | (442) | 3,249 |
| 2000 | 10,327 | 8,109 | (2,218) | (461) | 2,788 |
| 2001 | 10,661 | 8,109 | (2,551) | (472) | 2,316 |
| 2002 | 11,006 | 8,109 | (2,896) | (478) | 1,838 |
| 2003 | 11,362 | 8,109 | (3,253) | (478) | 1,360 |
| 2004 | 11,730 | 8,109 | (3,621) | (474) | 886 |
| 2005 | 12,111 | 8,109 | (4,002) | (467) | 419 |
| 2006 | 11,443 | 7,434 | (4,009) | (419) | 0 |



000299

Appendix

Table 4

RATE REASONABLENESS ANALYSIS
Tariff Rate Levels for 84,001 - 104,000 Tons Per Month
(Based on Volume of 84,001 Tons) */

| Year | Total Cost ($000) | Total Revenue ($000) | Net Overpayment or Shortfall ($000) | Present Value Overpayment or Shortfall ($000) | Cumulative Present Value Overpayment or Shortfall ($000) |
|---|---|---|---|---|---|
| 1986 | 472 | 819 | 347 | 344 | 344 |
| 1987 | 7,685 | 9,828 | 2,144 | 2,005 | 2,348 |
| 1988 | 7,943 | 9,828 | 1,885 | 1,583 | 3,931 |
| 1989 | 7,885 | 9,828 | 1,943 | 1,462 | 5,393 |
| 1990 | 8,374 | 9,828 | 1,454 | 971 | 6,364 |
| 1991 | 9,104 | 9,599 | 495 | 297 | 6,661 |
| 1992 | 8,713 | 8,504 | (209) | (106) | 6,555 |
| 1993 | 8,404 | 8,366 | (38) | (17) | 6,538 |
| 1994 | 8,623 | 8,366 | (256) | (106) | 6,432 |
| 1995 | 8,902 | 8,366 | (536) | (198) | 6,235 |
| 1996 | 9,188 | 8,366 | (821) | (270) | 5,964 |
| 1997 | 9,483 | 8,366 | (1,116) | (328) | 5,637 |
| 1998 | 9,788 | 8,366 | (1,421) | (372) | 5,265 |
| 1999 | 10,103 | 8,366 | (1,737) | (405) | 4,860 |
| 2000 | 10,429 | 8,366 | (2,062) | (429) | 4,431 |
| 2001 | 10,766 | 8,366 | (2,399) | (444) | 3,987 |
| 2002 | 11,114 | 8,366 | (2,747) | (453) | 3,534 |
| 2003 | 11,474 | 8,366 | (3,107) | (457) | 3,077 |
| 2004 | 11,845 | 8,366 | (3,479) | (456) | 2,622 |
| 2005 | 12,230 | 8,366 | (3,863) | (451) | 2,171 |
| 2006 | 11,555 | 7,669 | (3,886) | (406) | 1,765 |

*/ Volumes above this level would increase the overpayment condition for the SAPL.



000300

Appendix

Table 5

RATE REASONABLENESS ANALYSIS
Rate Levels for 104,001 - 125,000 Tons Per Month
(Based on Volume of 104,001 Tons) */

| Year | Total Cost ($000) | Total Revenue ($000) | Net Overpayment or Shortfall ($000) | Present Value Overpayment or Shortfall ($000) | Cumulative Present Value Overpayment or Shortfall ($000) |
|---|---|---|---|---|---|
| 1986 | 479 | 879 | 400 | 396 | 396 |
| 1987 | 7,882 | 10,546 | 2,664 | 2,491 | 2,887 |
| 1988 | 8,121 | 10,546 | 2,425 | 2,036 | 4,923 |
| 1989 | 8,097 | 10,546 | 2,449 | 1,842 | 6,765 |
| 1990 | 8,588 | 10,546 | 1,958 | 1,308 | 8,072 |
| 1991 | 9,355 | 7,813 | (1,542) | (834) | 7,239 |
| 1992 | 8,880 | 8,090 | (789) | (430) | 6,808 |
| 1993 | 8,489 | 8,736 | 247 | 116 | 6,924 |
| 1994 | 8,721 | 8,736 | 15 | 7 | 6,931 |
| 1995 | 9,003 | 8,736 | (267) | (98) | 6,833 |
| 1996 | 9,291 | 8,736 | (555) | (183) | 6,650 |
| 1997 | 9,590 | 8,736 | (854) | (250) | 6,400 |
| 1998 | 9,898 | 8,736 | (1,162) | (304) | 6,096 |
| 1999 | 10,217 | 8,736 | (1,480) | (345) | 5,751 |
| 2000 | 10,546 | 8,736 | (1,810) | (376) | 5,375 |
| 2001 | 10,886 | 8,736 | (2,150) | (398) | 4,977 |
| 2002 | 11,238 | 8,736 | (2,502) | (413) | 4,564 |
| 2003 | 11,601 | 8,736 | (2,865) | (421) | 4,143 |
| 2004 | 11,977 | 8,736 | (3,241) | (424) | 3,719 |
| 2005 | 12,366 | 8,736 | (3,630) | (423) | 3,295 |
| 2006 | 11,683 | 8,008 | (3,675) | (384) | 2,911 |

*/ Volumes above this level would increase the overpayment condition for the SAPL.



000301

Appendix

Table 6

RATE REASONABLENESS ANALYSIS
Rate Levels for 125,001 - 160,000 Tons Per Month
(Based on Volume of 125,001 Tons) */

| Year | Total Cost ($000) | Total Revenue ($000) | Net Overpayment or Shortfall ($000) | Present Value Overpayment or Shortfall ($000) | Cumulative Present Value Overpayment or Shortfall ($000) |
|---|---|---|---|---|---|
| 1986 | 486 | 938 | 452 | 447 | 447 |
| 1987 | 8,089 | 11,250 | 3,161 | 2,956 | 3,403 |
| 1988 | 8,307 | 11,250 | 2,943 | 2,470 | 5,874 |
| 1989 | 8,320 | 11,250 | 2,930 | 2,204 | 8,077 |
| 1990 | 8,812 | 11,250 | 2,438 | 1,628 | 9,705 |
| 1991 | 9,617 | 8,302 | (1,315) | (695) | 9,010 |
| 1992 | 9,054 | 8,280 | (774) | (422) | 8,588 |
| 1993 | 8,578 | 8,925 | 347 | 163 | 8,751 |
| 1994 | 8,824 | 8,925 | 101 | 43 | 8,794 |
| 1995 | 9,109 | 8,925 | (184) | (67) | 8,726 |
| 1996 | 9,400 | 8,925 | (475) | (156) | 8,570 |
| 1997 | 9,702 | 8,925 | (777) | (228) | 8,342 |
| 1998 | 10,014 | 8,925 | (1,089) | (285) | 8,057 |
| 1999 | 10,336 | 8,925 | (1,411) | (329) | 7,728 |
| 2000 | 10,669 | 8,925 | (1,744) | (362) | 7,366 |
| 2001 | 11,013 | 8,925 | (2,088) | (386) | 6,980 |
| 2002 | 11,368 | 8,925 | (2,443) | (403) | 6,577 |
| 2003 | 11,736 | 8,925 | (2,811) | (413) | 6,164 |
| 2004 | 12,116 | 8,925 | (3,191) | (418) | 5,746 |
| 2005 | 12,508 | 8,925 | (3,583) | (418) | 5,328 |
| 2006 | 11,818 | 8,181 | (3,637) | (380) | 4,948 |

*/ Volumes above this level would increase the overpayment condition for the SAPL.



000302

Table 7

RATE REASONABLENESS ANALYSIS
Rate Levels for 160,001 - 200,000 Tons Per Month
(Based on Volume of 160,001 Tons) */

| Year | Total Cost ($000) | Total Revenue ($000) | Net Overpayment or Shortfall ($000) | Present Value Overpayment or Shortfall ($000) | Cumulative Present Value Overpayment or Shortfall ($000) |
|---|---|---|---|---|---|
| 1986 | 498 | 1,120 | 622 | 616 | 616 |
| 1987 | 8,434 | 13,440 | 5,007 | 4,681 | 5,297 |
| 1988 | 8,617 | 13,440 | 4,823 | 4,047 | 9,345 |
| 1989 | 8,691 | 13,440 | 4,749 | 3,570 | 12,915 |
| 1990 | 9,186 | 13,440 | 4,254 | 2,840 | 15,755 |
| 1991 | 10,055 | 9,671 | (384) | (128) | 15,626 |
| 1992 | 9,345 | 8,208 | (1,137) | (612) | 15,014 |
| 1993 | 8,726 | 8,832 | 106 | 50 | 15,064 |
| 1994 | 8,995 | 8,832 | (163) | (67) | 14,998 |
| 1995 | 9,285 | 8,832 | (453) | (167) | 14,830 |
| 1996 | 9,582 | 8,832 | (750) | (247) | 14,583 |
| 1997 | 9,889 | 8,832 | (1,057) | (310) | 14,273 |
| 1998 | 10,206 | 8,832 | (1,374) | (360) | 13,913 |
| 1999 | 10,534 | 8,832 | (1,702) | (397) | 13,516 |
| 2000 | 10,873 | 8,832 | (2,041) | (424) | 13,092 |
| 2001 | 11,224 | 8,832 | (2,392) | (443) | 12,650 |
| 2002 | 11,586 | 8,832 | (2,754) | (454) | 12,195 |
| 2003 | 11,960 | 8,832 | (3,128) | (460) | 11,736 |
| 2004 | 12,347 | 8,832 | (3,514) | (460) | 11,275 |
| 2005 | 12,746 | 8,832 | (3,914) | (457) | 10,819 |
| 2006 | 12,043 | 8,096 | (3,947) | (412) | 10,406 |

*/ Volumes above this level would increase the overpayment condition for the SAPL.



000303

Table 8

RATE REASONABLENESS ANALYSIS
Rate Levels for 200,001 - 234,000 Tons Per Month
(Based on Volume of 200,001 Tons) */

| Year | Total Cost ($000) | Total Revenue ($000) | Net Overpayment or Shortfall ($000) | Present Value Overpayment or Shortfall ($000) | Cumulative Present Value Overpayment or Shortfall ($000) |
|---|---|---|---|---|---|
| 1986 | 511 | 1,400 | 889 | 880 | 880 |
| 1987 | 8,828 | 16,800 | 7,972 | 7,454 | 8,334 |
| 1988 | 8,972 | 16,800 | 7,828 | 6,568 | 14,902 |
| 1989 | 9,115 | 16,800 | 7,685 | 5,776 | 20,678 |
| 1990 | 9,613 | 16,800 | 7,187 | 4,797 | 25,476 |
| 1991 | 10,556 | 14,708 | 4,152 | 2,492 | 27,967 |
| 1992 | 9,678 | 9,870 | 193 | 108 | 28,075 |
| 1993 | 8,895 | 9,600 | 705 | 329 | 28,405 |
| 1994 | 9,191 | 9,600 | 409 | 171 | 28,576 |
| 1995 | 9,487 | 9,600 | 113 | 43 | 28,618 |
| 1996 | 9,790 | 9,600 | (190) | (62) | 28,556 |
| 1997 | 10,103 | 9,600 | (503) | (147) | 28,409 |
| 1998 | 10,427 | 9,600 | (827) | (216) | 28,193 |
| 1999 | 10,761 | 9,600 | (1,161) | (271) | 27,922 |
| 2000 | 11,107 | 9,600 | (1,507) | (313) | 27,609 |
| 2001 | 11,465 | 9,600 | (1,865) | (345) | 27,264 |
| 2002 | 11,834 | 9,600 | (2,234) | (368) | 26,895 |
| 2003 | 12,216 | 9,600 | (2,616) | (384) | 26,511 |
| 2004 | 12,610 | 9,600 | (3,010) | (394) | 26,117 |
| 2005 | 13,018 | 9,600 | (3,418) | (399) | 25,718 |
| 2006 | 12,300 | 8,800 | (3,500) | (366) | 25,353 |

*/ Volumes above this leval would increase the overpayment condition for the SAPL.



000304

Table 9

Rate Reasonableness Analysis
for
Defendants' Traffic Alone

| Year | Total Cost ($000) | Total Revenue ($000) | Net Overpayment or Shortfall ($000) | Present Value Overpayment or Shortfall ($000) | Cumulative Present Value Overpayment or Shortfall ($000) |
|---|---|---|---|---|---|
| 1986 | 278 | 769 | 490 | 486 | 486 |
| 1987 | 6,952 | 9,024 | 2,072 | 1,951 | 2,437 |
| 1988 | 7,861 | 9,909 | 2,048 | 1,717 | 4,154 |
| 1989 | 7,158 | 9,636 | 2,478 | 1,869 | 6,023 |
| 1990 | 8,135 | 9,306 | 1,171 | 780 | 6,803 |
| 1991 | 8,704 | 9,244 | 540 | 322 | 7,125 |
| 1992 | 8,899 | 9,090 | 191 | 105 | 7,230 |
| 1993 | 9,139 | 8,984 | (155) | (75) | 7,155 |
| 1994 | 8,969 | 8,571 | (398) | (163) | 6,992 |
| 1995 | 9,021 | 8,261 | (760) | (281) | 6,711 |
| 1996 | 9,311 | 8,261 | (1,050) | (346) | 6,365 |
| 1997 | 9,611 | 8,261 | (1,350) | (396) | 5,969 |
| 1998 | 9,920 | 8,261 | (1,659) | (434) | 5,535 |
| 1999 | 10,240 | 8,261 | (1,979) | (462) | 5,073 |
| 2000 | 10,571 | 8,261 | (2,310) | (480) | 4,593 |
| 2001 | 10,913 | 8,261 | (2,652) | (491) | 4,102 |
| 2002 | 11,266 | 8,261 | (3,005) | (496) | 3,606 |
| 2003 | 11,631 | 8,261 | (3,370) | (495) | 3,111 |
| 2004 | 12,009 | 8,261 | (3,748) | (491) | 2,620 |
| 2005 | 12,399 | 8,261 | (4,138) | (483) | 2,137 |
| 2006 | 11,715 | 7,573 | (4,142) | (433) | 1,704 |



000305

Table 10

Rate Reasonableness Analysis
for the
Full Traffic Projection of
Defendants' and Ashley Creek

| Year | Total Cost ($000) | Total Revenue ($000) | Net Overpayment or Shortfall ($000) | Present Value Overpayment or Shortfall ($000) | Cumulative Present Value Overpayment or Shortfall ($000) |
|---|---|---|---|---|---|
| 1986 | 412 | 945 | 533 | 528 | 528 |
| 1987 | 8,124 | 13,447 | 5,323 | 4,972 | 5,500 |
| 1988 | 8,621 | 13,823 | 5,202 | 4,364 | 9,864 |
| 1989 | 8,388 | 13,494 | 5,106 | 3,839 | 13,703 |
| 1990 | 9,122 | 13,752 | 4,630 | 3,095 | 16,798 |
| 1991 | 9,921 | 12,511 | 2,591 | 1,554 | 18,352 |
| 1992 | 9,472 | 10,069 | 597 | 326 | 18,678 |
| 1993 | 9,073 | 9,697 | 624 | 296 | 18,974 |
| 1994 | 9,172 | 10,798 | 1,626 | 666 | 19,639 |
| 1995 | 9,361 | 11,298 | 1,938 | 719 | 20,358 |
| 1996 | 9,660 | 11,298 | 1,638 | 541 | 20,900 |
| 1997 | 9,970 | 11,298 | 1,329 | 391 | 21,291 |
| 1998 | 10,290 | 11,298 | 1,008 | 265 | 21,556 |
| 1999 | 10,621 | 11,298 | 678 | 159 | 21,714 |
| 2000 | 10,963 | 11,298 | 336 | 70 | 21,785 |
| 2001 | 11,316 | 11,298 | (17) | (3) | 21,782 |
| 2002 | 11,681 | 11,298 | (383) | (63) | 21,719 |
| 2003 | 12,058 | 11,298 | (760) | (111) | 21,608 |
| 2004 | 12,449 | 11,298 | (1,150) | (150) | 21,457 |
| 2005 | 12,852 | 11,298 | (1,553) | (181) | 21,276 |
| 2006 | 12,143 | 10,357 | (1,786) | (186) | 21,090 |



000306

Supreme Court, U.S.
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No. 02-1758

In The

# Supreme Court of the United States

ASHLEY CREEK PHOSPHATE CO.,

*Petitioner,*

v.

CHEVRON U.S.A. INC., et al.,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## CHEVRON'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

E. SCOTT SAVAGE
*Counsel of Record*
STEPHEN R. WALDRON
BERMAN, TOMSIC & SAVAGE
50 South Main, Suite 1250
Salt Lake City, Utah 84144
(801) 328-2200

*Attorneys for Respondents*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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## QUESTIONS PRESENTED[1]

1. Should the established rule that requires an antitrust plaintiff to demonstrate intent and preparedness to enter a prospective business when he or she is seeking to recover lost profits from that inchoate business be abolished or altered? This rule dates back to 1908, there is absolutely no conflict amongst the United States courts of appeals as to the rule, and the rule efficiently addresses the need for antitrust standing.

2. Did this plaintiff, who was seeking to recover lost profits for a prospective mining business allegedly thwarted by an antitrust violation, lack standing because of a lack of demonstrated preparedness? In this case, the plaintiff never determined during the alleged violation whether there was a market for its mineral, what price it could have charged, what its costs would be or what its reliable mineral reserve was and the plaintiff did not demonstrate any capability to finance or enter the business.

3. Can a plaintiff, seeking to recover lost profits for a prospective business allegedly thwarted by an antitrust violation, prove an antitrust injury (as required to have standing) merely by the ownership of property that it claims it would have used to develop the business, without proving demonstrated intent and preparedness to enter the business?

---

[1] The Chevron Respondents object to Petitioner's "Questions Presented." Petitioner's "Questions" raise issues not addressed below, misstate the record, and misstate the decisions Petitioner seeks to have reviewed.

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## STATEMENT OF THE CASE

### I. INTRODUCTION

The Chevron Respondents,[2] defendants below, set forth this Statement of the Case to demonstrate the lack of a basis to grant Petitioner Ashley Creek Phosphate Company's ("Ashley") Petition for Writ of Certiorari ("Petition"), and to satisfy their obligation to correct Ashley's numerous misstatements of the record.[3]

Between May 1986 and April 1992, Chevron owned and operated a pipeline used to transport phosphate concentrate from its phosphate mine near Vernal, Utah to its phosphate fertilizer plant at Rock Springs, Wyoming. Ashley, plaintiff below, claimed that the pipeline was an "essential facility" needed to access a railhead at Rock Springs and that Chevron violated the antitrust laws by allegedly refusing to offer reasonable tariffs for the pipeline. Ashley claimed that, as a result of the allegedly excessive pipeline tariffs, it was prevented from developing a phosphate mine on two phosphate mining leases it owned near Vernal. Ashley further claimed that it intended to use the pipeline to ship phosphate concentrate to Rock Springs, and sell the concentrate to one or more of the phosphate fertilizer producers located in the western

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[2] The Chevron Respondents consist of: Chevron Corporation; Chevron U.S.A. Inc.; Chevron Chemical Company; Chevron Pipe Line Company; and Chevron Industries, Inc. "Chevron" is used herein to refer to one or more of the Chevron Respondents.

[3] Ashley misstates the record rather than demonstrate any genuine disputes as to material facts. Ashley continues to misstate the record despite the adverse findings of the District Court, which were affirmed by the Court of Appeals.

United States and Canada. **Ashley did not intend to build its own fertilizer plant and compete directly with Chevron in the fertilizer business.** Ashley sought to recover lost profit damages for its allegedly thwarted mining venture under Section 4 of the Clayton Act, 15 U.S.C. § 15 ("Section 4").

The Tenth Circuit Court of Appeals ("Court of Appeals") affirmed the United States District Court for the District of Utah's ("District Court") grant of Respondents' motions for summary judgment on the grounds that Ashley could not satisfy the long-settled antitrust standing rule that requires a plaintiff seeking to recover lost profits for a prospective business allegedly thwarted by an antitrust violation to prove its demonstrated "intent and preparedness" to compete. The District Court and the Court of Appeals assumed Ashley's intent to compete, but determined that Ashley had failed to undertake even the most basic preparatory steps, including determining whether there was a market for its phosphate, even assuming a zero pipeline tariff.

The District Court and the Court of Appeals also determined that Ashley's possession of its phosphate leases was not itself sufficient to provide Ashley standing, because Ashley sought to recover lost profits for an allegedly thwarted prospective business that would have used the leases, rather than for any injury to the leases themselves.[4]

[4] The District Court also decided that the pipeline tariffs were not exclusionary under a tariff reasonableness analysis provided by the Surface Transportation Board for the pipeline. The Court of Appeals did

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## II. FACTUAL BACKGROUND

### A. Chevron's Development Of Its Phosphate Fertilizer Project

Phosphate and sulfur are required for the production of phosphate fertilizer. In the early 1980's, Chevron was about to obtain a large supply of sulfur as a by-product from its Wyoming natural gas project then under development. The sulfur was, in effect, a contaminant that had to be removed from the natural gas. Chevron could dispose of this sulfur, try to sell it, or use it to make something. Chevron decided to use this sulfur to make phosphate fertilizer and enter the phosphate fertilizer market.

Chevron's first step to develop its phosphate fertilizer project was its 1981 acquisition of an operating phosphate mine located near Vernal, Utah. The existing mine supplied phosphate concentrate by truck to a small, captive phosphate fertilizer plant located near Salt Lake City, Utah, and by truck and rail to Cominco, a phosphate fertilizer producer located in British Columbia. There was no pipeline. Chevron chose to site its fertilizer plant in Rock Springs, Wyoming because Rock Springs was a railhead and geographically convenient to the Wyoming sulfur and the Utah phosphate.

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not reach this issue, having decided Ashley lacked antitrust standing. Two of Ashley's "Questions Presented" relate to this aspect of the District Court's decision. However, Chevron does not address the District Court's rate reasonableness decision, since the case was decided on standing. Ashley merely argues that the District Court committed error, rather than state a basis for certiorari as to that issue.

Chevron decided to build a pipeline from its mine in Vernal, Utah to its fertilizer plant in Rock Springs, Wyoming because of the volume of material that it would be shipping. Trucking the material would have been cheaper, but the mountainous terrain and number of miles of non-interstate highways involved would have created a public relations disaster. The local highways are heavily used by vacationers and other recreationalists and would have been clogged with Chevron trucks because of the volume of concentrate required by the fertilizer plant. The pipeline also eliminated the potential of traffic accidents and was more reliable in the winter. Trucking, however, remained a viable option for smaller quantities of phosphates and Ashley never demonstrated what amount of concentrate it could have sold.[5] By May 1986, Chevron had completed its phosphate fertilizer project, which consisted of an expansion of the existing Vernal mine, a phosphate fertilizer plant near Rock Springs, Wyoming, and an approximately 90-mile pipeline to transport phosphate concentrate in slurry form from the mine to the plant.[6]

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[5] Ashley argued below that no trucking was possible from Vernal because, in 1986, the State of Utah was going to terminate Chevron's special overweight permits by which it trucked phosphate from Vernal. However, the State of Utah did not intend to, and did not, prohibit all trucking from Vernal. It was only terminating Chevron's special overweight trucking. The fact that trucking remained possible and economical after the pipeline started is demonstrated by both the bid that Chevron received from its trucking vendor to continue trucking under regular overweight permits and the same trucking vendor's solicitation of Ashley's business (to which Ashley never responded).

[6] While shipping the phosphate concentrate in slurry form was cost effective for supplying the Rock Springs plant, it was not cost effective for shipping concentrate for third-party sales. Whereas the slurry could be fed directly to the plant, it had to be dried to be shipped for third-party

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### B. Chevron's Experience Showed The Lack Of Demand For A New, Stand-Alone Western Phosphate Mine

During the time Chevron owned and operated the pipeline, the potential market for phosphate concentrate from phosphate mines located in the western United States was limited to the eight phosphate fertilizer producers (including Chevron) located in the western United States and Canada.[7] These fertilizer producers satisfied their phosphate concentrate requirements either from captive mines, under long-term supply contracts with third-party mines, or (for Cominco) a combination of the two.

Chevron made repeated efforts to generate phosphate concentrate sales from the Vernal mine to the other western phosphate fertilizer producers because such sales would have increased its revenues and enabled it to reduce its per unit production costs at the mine. However, despite its efforts, Chevron could not economically offer a price that would match what the other western phosphate fertilizer producers were paying for their phosphate concentrate. Chevron's third-party sales remained limited to sales to Cominco pursuant to a contract it had inherited when it acquired the Vernal mine.

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sales. The drying operation, and the handling of the extremely fine powdered phosphate that resulted, proved to be very costly.

[7] Phosphate mines located in the western United States (which produced only 6-12% of the total phosphate concentrate produced in the United States) could not compete on a delivered cost basis (*i.e.*, cost of product plus cost of delivery) with Florida mines anywhere other than the western United States and Canada.

***Chevron's sales to Cominco constituted the only third-party sales of phosphate concentrate from any phosphate mine located in the western United States.*** These sales were limited to approximately 350,000 tons of concentrate in 1986, less than 250,000 tons in 1987, and they stopped in July 1988. Cominco stopped purchasing concentrate from Chevron in July 1988, 26 months after the pipeline went on-line, because Cominco had expanded its own mine, which allowed it to produce all of its phosphate concentrate requirements at a cost lower than the price Chevron could offer.

From July 1988 onward, despite available unused capacity both at the Vernal mine and on the pipeline and Chevron's renewed attempts to generate third-party sales, ***the pipeline was not used to ship concentrate for third-party sales***. Chevron used only 1/3 of the pipeline capacity to supply the Rock Springs plant. From July 1988 onward, ***there were no third-party sales of phosphate concentrate from any mine located in the western United States***. Instead, from July 1988 onward, all western phosphate fertilizer producers satisfied all of their phosphate concentrate requirements from their own captive mines (six of the eight western producers) or under long-term sales contracts with mines located in Florida (two of the eight western producers).

Despite the availability of undeveloped western phosphate deposits (including deposits located closer to railheads than Ashley's deposit), no new phosphate mines were developed in the western United States during the time Chevron owned and operated the pipeline. During that time, not a single phosphate mine in the western United States was owned or operated on a stand-alone

basis. Instead, all such mines were part of integrated fertilizer operations.

### C. Chevron Exited The Phosphate Market At A Huge Loss

Chevron had gone ahead with its phosphate fertilizer project, in part, upon the assumption that phosphate fertilizer prices would increase during the late 1980's and early 1990's. This assumption proved wrong and phosphate fertilizer prices continued to decrease while Chevron was in this business. After operating the phosphate fertilizer project at a loss each year for six years, Chevron sold the project to certain of the SF Respondents in 1992 for $63.5 million.[8] This sale was at a substantial loss as Chevron had invested approximately $371 million of capital in the project.

### D. Ashley's Background And Lack Of Capability

Ashley is the only third-party to ever claim it needed access to the pipeline. Yet, Ashley never has been in the business of mining or selling phosphate concentrate, or any other business. Ashley never has had any paid employees and has no credit history. Ashley's sole assets are two State of Utah phosphate leases, which provide Ashley the right to mine phosphate on land located near the existing Vernal mine. Its sole principal, John Archer, operates Ashley part time from his house and pays its bills.

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[8] The SF Respondents are: SF Pipeline Limited Company; SF Phosphates Limited Company; Farmland Industries, Inc.; and J.R. Simplot Company. The SF Respondents are filing a separate Opposition to the Petition.

Mr. Archer never has developed or operated a mine and never has sold phosphate concentrate or any other mineral.

Although he never has developed or operated a mine, Mr. Archer has sold mineral leases, and has a long history of failed attempts to sell and get others to develop the two subject phosphate leases. Mr. Archer first acquired the subject phosphate leases from the State of Utah in 1963 and immediately sold them to Mountain Fuel Supply Company. Mountain Fuel failed to develop a mine and instead allowed the leases to lapse. Mr. Archer reacquired the leases in 1974 and sold them to Utah International in 1975. Utah International also failed to develop a mine after determining that development was not feasible. Utah International re-assigned the leases to Mr. Archer in 1984, at which time he formed Ashley to hold the leases. Mr. Archer then proceeded to attempt to sell the leases to Chevron and Cominco, both of which declined. Mr. Archer subsequently attempted to sell the leases to Cominco's successor, Agrium, which as late as 1997 declined.

### E. Ashley's Failure To Attempt Development

During the time Mr. Archer was trying to sell the leases to Cominco, in the spring of 1985, Ashley's then-part time mining consultant, David Aro, proposed to Mr. Archer an exploration program for Ashley's leases that summer. Mr. Aro told Mr. Archer that the proposed program "will be essential to the preliminary design of the plant and for the mine planning. **Anything less than this will leave you with insufficient data to complete your plans for the leases.**" (Emphasis added.)

However, despite the fact that no pipeline tariffs were due or published, Ashley failed to go forward with this

"essential" exploration program either in 1985 or any time prior to Chevron's sale of the phosphate fertilizer project in 1992. Without the program, Ashley: (1) had not verified that its leases contained "proven reserves," as necessary to obtain financing; (2) had no baseline data and so was unable to determine its operating and capital expenses; and (3) had not performed any testing or studies necessary to take its process design beyond the purely "conceptual" stage.[9]

Ashley's only "feasibility" study was a "very preliminary" March 1985 study performed by Mr. Aro. This study: (1) failed to determine Ashley's capital or operating expenses to within a 25% margin of error; (2) used an entirely arbitrary sales volume number of 1 million tons per year, whereas the total third-party sales of phosphate concentrate from all western mines – Chevron's sales to Cominco – were less than 250,000 tons in 1987 and non-existent after July 1988; and (3) used a $44 per ton sales price that was not based upon any contract or market study, but which Mr. Aro testified before the ICC was a "meaningless price" and which was ***$24 per ton higher*** than the price Cominco told Chevron it would have to beat

[9] Ashley misstates the record when it asserts that, by 1986, it "had explored and tested its properties, demonstrating their suitability, [and] preliminarily designed a mine and processing plant." [Petition at 3.] Neither before 1986 nor any time prior to Chevron's sale of the pipeline did Ashley conduct the "essential" exploration program that Mr. Aro proposed in 1985. Thus, Ashley did not verify that it had "proven reserves." Nor did it determine its stripping ratio, its ore quality, or its capital and operating costs. Ashley never determined if there was a market for its product at an economically feasible price. Thus, Ashley never was able to determine that the leases were "suitable" for development.

in 1988 for Cominco to continue to purchase from Chevron.[10]

According to Mr. Aro, his 1985 study was a "very preliminary" Type 1 study under a feasibility study classification system used in the mining industry. A Type 1 study is the most preliminary level, that "generally describes a hypothetical installation," but is "seldom adequate for positive acceptance of a project." At least a Type 3 study is needed to obtain financing. By 1989, Messrs. Aro and Archer agreed that the 1985 study was "badly out of date and in need of updating" and "is no longer defensible." As late as October 1991, Mr. Aro informed Mr. Archer that Ashley lacked sufficient data to perform even a Type 2 study.[11]

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[10] Ashley misstates the record when it asserts that, by 1986, Ashley "performed a preliminary feasibility study showing profitability of an operation selling phosphate concentrate through Rock Springs railhead to fertilizer plants competing with the new Chevron plant in the 'Western market' for phosphate fertilizer." [Petition at 3.] Ashley performed no feasibility study before 1986 or at any time that showed profitability of a mining venture selling phosphate concentrate in the western United States beyond the completely hypothetical 1985 study by Mr. Aro which he and Mr. Archer later admitted was "indefensible."

[11] Ashley misstates the record when it asserts that there is "voluminous uncontested evidence in this record that the leases hold vast quantities of commercial phosphate ore, which defendants' development of the adjoining, similar property demonstrates can be developed at a substantial profit." [Petition at 10 n.1.] As Mr. Aro acknowledged, without performing the 1985 proposed exploration program, Ashley had not established that it even had "proven reserves." Ashley never determined whether its ore was "commercial," either in terms of ore quality or the viability of its alleged mining venture. The existing Vernal mine could not substantiate the viability of Ashley's alleged prospective mine. Despite operating at lower costs than Ashley could have during the time it was owned by Chevron, the Vernal mine was not viable as a source of phosphate concentrate for fertilizer

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Ashley never performed any marketing studies It never obtained any purchase commitments or entered into any sales contracts, which is the only way to establish a price for the sale of phosphate concentrate (due to a lack of a public or "spot" phosphate concentrate market). Mr. Archer allegedly talked to several phosphate fertilizer producers about their interest in purchasing phosphate concentrate, but never discussed price or quantity. Ashley never investigated or negotiated any freight costs for the rail transport of concentrate from Rock Springs to any fertilizer producer, despite the fact that such costs were a critical factor for determining the delivered cost of its product and, therefore, whether its proposed mining venture would be viable.

Ashley estimated it would cost $67 million to develop the leases in 1992, but never sought third-party financing. Ashley never was in a position to obtain financing without at least a Type 3 feasibility study.

Ashley failed to consummate a single contract needed to develop or operate a mine. It never obtained a mining permit, and lacked sufficient data to be able to submit a mining permit application. Ashley never obtained any of the numerous other permits that were required to develop and operate a mine, including environmental and building permits. Ashley never obtained any of the necessary right-of-ways for siting a milling and beneficiation plant at Vernal or a pipeline receiving and rail loading facility in Rock Springs.[12]

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producers. Chevron's operating costs and shipping costs exceeded the amount other western fertilizer producers were willing to pay.

[12] It is not clear to what Ashley refers when it asserts that, as of 1986, it and Chevron "shared access rights to a federal right-of-way

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Ashley never investigated the option of trucking phosphate concentrate to either Rock Springs or any other available railhead despite having a trucking company (Chevron's trucking vendor) solicit its business. There is no evidence that Ashley could have sold phosphate concentrate at any volume, let alone the volume Chevron was contemplating when it decided to build the pipeline rather than truck concentrate for its project.[13]

In 1991, in response to Mr. Archer's inquiry about obtaining a mining permit for the leases, Mr. Aro wrote to Mr. Archer attaching several letters written over the previous six years which addressed the numerous actions that had to be taken to obtain a mining permit and develop the leases, none of which were ever performed. Referring to those letters, Mr. Aro wrote to Mr. Archer, "It can be seen that there is a tremendous amount of work to be done to fully permit and develop this property."

As late as October 1993, after Chevron had divested itself of the pipeline and after Ashley had been pursuing litigation for seven years, Mr. Aro wrote a note complaining

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connecting the [Vernal] field to a railhead." [Petition at 3.] Ashley never raised this point at any time below. In any event, the record is clear that Ashley never had an ownership right in the pipeline or the pipeline right-of-ways.

[13] Instead, the record shows that there was no demand for third-party sales of phosphate concentrate from any new mine located in the western United States after July 1988. Ashley misstates the record when it variously asserts that the pipeline access was "essential to its development" or "an essential common carrier." [Petition *seriatim*.] Ashley never investigated the other transportation means that were available. Simply because the pipeline was the only option in actual use did not make it "essential" for market access. *See supra* p. 5 and note 5.

of Ashley's emphasis on litigation to the exclusion of development. Mr. Aro wrote:

> I have felt for some time that the level of *legal effort* far exceeds the level of *technical data* that is essential to verifying the reserves and costs. Without "proven" reserves and "acceptable" costs, the legal arguments could be hypothetical and meaningless. At present time: 1-No proven reserves, only prob[able] & prosp[ective]. 2-No detailed estimate of capital costs and operating costs. 3-No definition of metall[urgy], needed for conceptual plant design.

Ashley pursued litigation in lieu of development to avoid forfeiture of the leases under the State of Utah's requirement that it diligently develop the leases. Ashley repeatedly justified its lack of development to the State on the grounds that, in lieu of development, it was pursuing litigation.

Mr. Archer testified that Ashley never intended to develop the leases absent it obtaining an ownership interest in the pipeline.[14] This lack of intention (and the lack of a market) is reflected in the fact that ***Ashley still has not developed a mine to the present day***, despite the fact that, in January 1999, the SF Respondents filed a fourth pipeline tariff that recovers only operating expenses. Thus, since January 1999, Ashley could use the pipeline without paying anything for the cost of its original construction (return on capital investment).

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[14] Ashley misstates the record when it asserts this testimony did not exist. [Petition at 24 n.2.] Mr. Archer's testimony is part of the record.

## III. PROCEDURAL HISTORY

### A. Initiation Of The Underlying District Court Action

Having already brought litigation before the Interstate Commerce Commission ("ICC") to force Chevron to file a formal tariff despite its utter lack of preparation to compete, on June 19, 1989 (the day before Chevron's first formal tariff was to go into effect), Ashley filed suit against Chevron in the United States District Court for the District of Utah. Ashley asserted several claims under the Sherman Antitrust and Clayton Acts. Each claim was based on the core allegation that the pipeline was an "essential facility" needed to access the railhead at Rock Springs such that Chevron's offer of allegedly unreasonable (excessive) pipeline tariffs operated as a barrier to Ashley's entry into an alleged market for third-party sales of phosphate concentrate to fertilizer producers. Ashley sought lost profit damages under Section 4 for its allegedly thwarted mining venture. The State of Utah also joined as a plaintiff, suing merely in its capacity as Ashley's lessor and asserting claims that were entirely derivative of Ashley's claims.

### B. The Rate Reasonableness Litigation Before The ICC/STB

Shortly after the lawsuit was initiated, the parties stipulated that the ICC should determine the tariff reasonableness issue and the District Court stayed the action pending the ICC's determination. For the next seven years, the parties litigated the tariff methodology and reasonableness before the ICC and then its successor agency, the Surface Transportation Board ("STB"). The SF

Respondents were joined in the ICC/STB action after they purchased the pipeline from Chevron in 1992.

In 1996, the STB issued a decision that applied only to the pipeline. The STB decision did not establish an allowable tariff for the pipeline but, instead, established a "framework" for determining tariff "reasonableness," which depended upon whether there was a cumulative over-collection or under-collection using actual pipeline volumes and tariff rates over the expected 20-year lifetime of the pipeline.[15] The STB set forth several volume scenarios in its decision, some of which showed a 20-year over-collection, but expressly stated that it was up to the District Court to determine what actual volumes were and that the District Court was not bound by any of the STB's scenarios. The STB expressly stated that, "Our role is simply to assist the court by presenting a framework for addressing the narrow issue that is the subject of our primary jurisdiction."

After the STB issued its decision, the District Court lifted the stay. Ashley promptly amended its complaint to join the SF Respondents as defendants.

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[15] Ashley misstates the record when it suggests that the STB required that pipeline tariffs not exceed "the highest price competition would allow." [Petition, "Questions Presented" No. 2.] Under the STB's "framework," whether the pipeline tariffs were reasonable depends upon comparing: (1) revenues generated under the pipeline tariffs (which depends upon actual tariffs in place and actual volumes); and (2) allowable revenues over a 20-year period starting on December 1, 1986. Allowable revenues were calculated to provide for a return on capital and recovery of operating expenses. If tariff revenues under proven volumes exceed allowable revenues on a cumulative basis over the 20-year period – *i.e.*, there was a 20-year cumulative over-collection – then the tariffs would be unreasonable to the extent of the over-collection.

### C. The District Court's Grant Of The Respondents' Motions For Summary Judgment

The SF Respondents moved for summary judgment on all of Ashley's claims on the grounds that: (1) Ashley lacked antitrust standing; and (2) the pipeline tariffs were reasonable and, therefore, not exclusionary. In July 2000, the District Court granted the SF Respondents' motion for summary judgment on each of the grounds advanced by the SF Respondents and dismissed all of Ashley's claims against the SF Respondents with prejudice. The District Court ruled that Ashley lacked the demonstrated preparedness required to have antitrust standing.[16]

Thereafter, Chevron made two motions for summary judgment on all of Ashley's claims, one on the ground that Ashley lacked antitrust standing and the second on the ground that Ashley could not prove antitrust liability because the tariffs were not exclusionary, the pipeline was not an "essential facility," and Chevron lacked monopoly power in the alleged relevant phosphate concentrate market. In January 2001, the District Court granted both of Chevron's motions for summary judgment for the same reasons it granted the SF Respondents' motion for summary judgment, and dismissed Ashley's claims against Chevron with prejudice.

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[16] The District Court also ruled that the pipeline tariffs were "reasonable" under the STB decision such that the tariffs were not exclusionary. As a result, Ashley misstates the record by stating as fact throughout its "Questions Presented" and Petition that the tariffs were "illegal" and have been found to be unreasonable. [*See, e.g.*, Petition at 4-5.] The District Court ruled directly otherwise.

### D. The Court Of Appeals' Decision

Ashley appealed to the Tenth Circuit Court of Appeals the grant of the Respondents' motions for summary judgment and the Court of Appeals affirmed the District Court's decision solely on the ground that Ashley lacked antitrust standing. *Ashley Creek Phosphate Co. v. Chevron U.S.A. Inc.*, 315 F.3d 1245 (10th Cir. 2003).

In deciding that Ashley had not shown antitrust standing, the Court of Appeals first held that Ashley did not satisfy the "preparedness" prong of the "intent and preparedness" test used for determining antitrust standing of a plaintiff who claims an antitrust violation thwarted an inchoate business. *Ashley Creek*, 315 F.3d at 1254-55 (citing *Curtis v. Campbell-Taggart, Inc.*, 687 F.2d 336, 338 (10th Cir. 1982)).[17] Like the District Court, the Court of Appeals assumed Ashley's intent, but held that Ashley lacked the required preparedness based upon the following facts that were supported by the record on appeal: (1) although Ashley estimated it would cost in excess of $67 million for it to enter the phosphate concentrate market, Ashley had only a few thousand dollars and had done nothing to obtain financing; (2) Ashley had completed only a limited "Type 1" feasibility study, while

[17] As observed by the Court of Appeals, under the preparedness prong of the "intent and preparedness" test, a court reviews whether a plaintiff had the required preparedness by evaluating four "key" factors: "(1) ability to finance the business and purchase the necessary facilities and equipment; (2) consummation of contracts needed for the proposed venture; (3) affirmative actions by the plaintiff to engage in the proposed business; and (4) the background and experience of the plaintiff in the prospective business." *Ashley Creek*, 315 F.3d at 1254-55 (citing *Curtis*, 687 F.2d at 338).

at least a "Type 3" or "Type 4" feasibility study was required to secure financing; (3) Ashley had not consummated any of the contracts necessary to operate a phosphate mine, including any sales contracts (Ashley had never discussed price with any prospective customer and had only negotiated, but never entered, a water supply contract); (4) Ashley never obtained any of the many permits necessary to develop and operate a mining operation; (5) Ashley lacked the necessary experience and background in the business of selling phosphate concentrate; and (6) Ashley continued to fail to take any preparatory steps after Chevron and the SF Respondents filed a series of successively lower tariffs. *Id.* at 1255-58.

The Court of Appeals rejected as insufficient and largely unsupported Ashley's contention that it satisfied the preparedness test based upon a few "preparatory" steps that Ashley asserted it undertook, including: (1) its allegedly having obtained a water supply contract (which the record showed did not happen); (2) preliminary design of a mining operation (in a permit application which was rejected on multiple grounds and never further pursued); (3) performing the "preliminary" Type 1 study (which was at least two steps removed from a bankable feasibility study); (4) allegedly commencing initial negotiations with potential customers (which consisted of talks with only one customer and no discussion of price or quantity); and (5) allegedly commencing inquiries regarding financing (of

which there was no evidence in the record).[18] *Id.* at 1256-67.

Second, the Court of Appeals held that Ashley's lack of preparedness was not excused under a "futility exception" to the preparedness test. *Id.* at 1258. The Court of Appeals recognized that several other courts had adopted a "futility exception" to the preparedness test, under which the preparatory step of making a demand or request to a defendant can be excused as futile due to the antitrust violation. *Id.* The Court of Appeals acknowledged its willingness to adopt a similar exception. *Id.* However, without analyzing the parameters of the exception that it would adopt, the Court of Appeals held that the exception would not excuse Ashley's failure to undertake even the most basic of preparatory steps of determining whether: (1) there was a market; (2) the exact nature of its reserves; and (3) its own costs within a reasonable margin, so as to determine whether its alleged mining venture would have been viable at even a zero pipeline tariff rate. *Id.*

Third, the Court of Appeals decided that Ashley had not shown an antitrust injury to property. *Id.* at 1260. The Court of Appeals rejected Ashley's argument that, based merely upon its ownership of its phosphate leases, it had antitrust standing to sue for recovery of lost profits for an

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[18] Ashley's assertion that its statement of facts in response to Respondents' motions for summary judgment, including its assertion that Ashley undertook all possible preparatory steps before a tariff was due, was "uncontested" and, thus, admitted [Petition at 24 n.2], is blatantly false, as observed by the Court of Appeals. Ashley's assertion that the Court of Appeals made findings based upon disputed evidence [*id.*] also is not supported by the record.

allegedly thwarted potential mining business. *Id.* at 1259-60. While recognizing that Ashley's leases were "property," the Court of Appeals observed that Section 4 grants standing not for mere "property" but for "injury to property." However, Ashley was not claiming that its title to the leases was in any manner clouded by the alleged antitrust violation. *Id.* Instead, the Court of Appeals observed, Ashley claimed injury to an alleged inchoate business that would use the leases. *Id.* Therefore, the Court of Appeals held, to have standing to recover lost profits for its alleged inchoate business, Ashley had to satisfy the "intent and preparedness" test to prove its antitrust standing. *Id.* The Court of Appeals stated that this holding was limited to the "narrow circumstance" where a plaintiff claimed its injury flowed from its claim that it would have used its property as part of a prospective business operation. *Id.* at 1260 & n.16.

## ARGUMENT

The Court of Appeals' decision regarding Ashley's lack of antitrust standing does not provide a basis for grant of the Petition because the decision applied settled law in an analysis limited in application to Ashley.

### A. The Court Of Appeals' Holding That Ashley Had Not Shown An Antitrust Injury To Business Does Not Provide A Basis For Grant Of The Petition Because The Court Of Appeals Applied Settled Law

The "intent and preparedness" test relied upon by the Court of Appeals is an established analytical tool for

determining both the antitrust injury and the direct causal nexus components of antitrust standing. *Bubar v. Ampco Foods, Inc.*, 752 F.2d 445, 450 (9th Cir. 1985); *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 994 (D.C. Cir. 1977); *Jayco Sys., Inc. v. Savin Bus. Mach. Corp.*, 777 F.2d 306, 313-314 (5th Cir. 1985); *Cable Holdings of Georgia, Inc. v. Home Video, Inc.*, 825 F.2d 1559, 1562 (11th Cir. 1987). Where a plaintiff claims an antitrust violation was a barrier to its going into a business, the plaintiff has no operating business that it can show was injured. Therefore, only if that plaintiff can show a demonstrated intent and preparedness to compete can the plaintiff prove a non-speculative business interest that in fact was injured as a result of an antitrust violation, as required to prove antitrust standing. *Id.* The test recognizes that not all who claim to be thwarted competitors are valid antitrust plaintiffs and that, instead, most businesses fail for reasons unrelated to antitrust policy, and emphasizes that it takes more than a mere hope or expectation to become a competitor to have standing to recover treble lost profits under the antitrust laws for a business that never existed. *Id.*; *see also Denver Petroleum Corp. v. Shell Oil Co.*, 306 F. Supp. 289, 307-08 (D. Colo. 1969) (stating that mere hope or expectation is insufficient).

The "intent and preparedness" test relied upon by the Court of Appeals has been a settled test of antitrust standing since 1908. *See Pennsylvania Sugar Ref. Co. v. American Sugar Ref. Co.*, 166 F. 254, 260 (2d Cir. 1908). The test has been used by this Court. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 126-129 (1969). The test has been used by the Tenth Circuit since 1982. *See Curtis*, 687 F.2d at 338. In addition to the Tenth Circuit, the test has been adopted by every circuit considering the

issue of a plaintiff's antitrust standing when the plaintiff claims its prospective business was thwarted by an antitrust violation.[19] There is no conflict amongst the circuits regarding the "intent and preparedness" test relied upon by the Court of Appeals.

This Court and several circuits have recognized a limited "futility exception" to the preparedness test. *See Hazeltine*, 395 U.S. at 120 n.15; *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566, 1572 (11th Cir. 1991), *cert. denied*, 506 U.S. 903 (1992); *Fleer Corp. v. Topps Chewing Gum, Inc.*, 415 F. Supp. 176, 179-80 (E.D. Pa. 1976). The Tenth Circuit indicated in its decision in this matter that it too would be willing to adopt such an "exception." Therefore, the Court of Appeals' decision as regards the "futility exception" also does not present any conflict amongst the circuits.

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[19] *Hecht*, 570 F.2d at 994; *Indium Corp. of America v. Semi-Alloys, Inc.*, 781 F.2d 879, 882 (Fed. Cir. 1985), *cert. denied*, 479 U.S. 820 (1986); *Engine Specialties, Inc. v. Bombardier, Ltd.*, 605 F.2d 1, 9 (1st Cir. 1979), *cert. denied*, 446 U.S. 983 (1980); *Pennsylvania Sugar*, 166 F. at 260; *Triangle Conduit & Cable Co. v. National Elec. Prod. Corp.*, 152 F.2d 398, 399 (3d Cir. 1945); *North Carolina Elec. Membership Corp. v. North Carolina Power & Light Co.*, 780 F. Supp. 322, 340 (M.D.N.C. 1991), *aff'd*, 995 F.2d 1063 (4th Cir. 1993); *North Texas Producers Ass'n v. Young*, 308 F.2d 235, 238-243 (5th Cir. 1962), *cert. denied*, 372 U.S. 929 (1963); *Volasco Products Co. v. Lloyd A. Fry Roofing Co.*, 308 F.2d 383, 395-396 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963); *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466, 475 (7th Cir. 1982), *cert. denied*, 461 U.S. 958 (1983); *Central Telecomm. Inc. v. TCI Cablevision, Inc.*, 800 F.2d 711, 727-729 (8th Cir. 1986), *cert. denied*, 480 U.S. 910 (1987); *Stearns v. Tinker & Rasor*, 252 F.2d 589, 606 (9th Cir. 1957); *Cable Holdings of Georgia, Inc. v. Home Video, Inc.*, 825 F.2d 1559, 1562-63 (11th Cir. 1987).

Ashley apparently does not dispute its need to satisfy the "intent and preparedness" test or the "futility exception." Instead, Ashley merely argues that the Court of Appeals incorrectly applied correct rules of law because Ashley allegedly did all it could absent an offer of allegedly non-exclusionary tariffs.[20] This argument does not raise an important question of federal law. The Court of Appeals' decision, which held that Ashley did not satisfy the preparedness test and did not fall within an exception, was fact specific to Ashley. Even (incorrectly) assuming error, any impact would be limited to Ashley. Indeed, any error was beyond the purview of antitrust laws because Ashley never showed any impact on competition. Instead, Ashley relied upon only its alleged exclusion, *see Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 344 (1990); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985); *Brown Shoe Co. v. United States*, 370 U.S. 294, 370-74 (1962), and neither proved that the pipeline was an essential facility nor established Chevron's monopoly

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[20] Contrary to Ashley's argument, the Court of Appeals did not require Ashley to show that its alleged mining venture was profitable, or the amount of its profits, to show an "injury to business." Instead, the Court of Appeals merely recognized that ***where feasibility is an issue*** (such as in the present case), a plaintiff claiming its business was thwarted by an antitrust violation must prove that, at the time of the alleged violation, there was a reasonable basis for determining that the proposed business was feasible in order to prove that the proposed business was an actual business interest that in fact was thwarted by the antitrust violation rather than due to infeasibility. This is in accord with settled law. *See, e.g., Cable Holdings*, 825 F.2d at 1562; *Gas Utilities Co. of Ala., Inc. v. Southern Natural Gas Co.*, 825 F. Supp. 1551, 1572 (N.D. Ala. 1992); *Practice Perfect, Inc. v. Hamilton County Pharm. Ass'n*, 732 F. Supp. 798, 803 (S.D. Ohio 1989).

power in the alleged relevant phosphate concentrate market.

Moreover, Ashley continues to misconstrue the "futility exception" and ignores its own utter lack of demonstrated preparedness. The "futility exception" recognized by this Court and the authorities relied upon by Ashley merely acknowledge that a plaintiff's failure to demand a contract or license from the defendant can be excused where the demand was futile, *if* the plaintiff otherwise shows demonstrated preparation to compete. This "exception" does not obviate the need to otherwise show intent and preparedness to compete, as shown by the fact that every decision recognizing the "futility exception" did so in the context of applying the settled intent and preparedness test.[21] *See Hazeltine*, 395 U.S. at 120 n.15; *Thompson*, 934 F.2d at 1572; *Fleer*, 415 F. Supp. at 179. By arguing that the alleged antitrust violation prevented its preparation,

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[21] Ashley argues that the District Court and Court of Appeals erred in refusing to consider its expert witness damage report on the issue of its preparedness. Neither court addressed the issue. Ashley cites no authority requiring the consideration of its damage study on the issue of its preparedness so as to raise an issue for review by this Court. Instead, the authorities indicate the contrary. *See, e.g., Hayes v. Solomon*, 597 F.2d 958, 975 (5th Cir. 1979). An expert damage study is only relevant on the issue of damages and, as Ashley itself points out, there is a distinction between standing and damages. A damage study necessarily is a hypothetical construction of what a plaintiff "could have done," whereas the "intent and preparedness" test necessarily focuses on the actual status of the plaintiff's intent and preparedness at the time of the alleged antitrust violation. *See, e.g., Bubar*, 752 F.2d at 452; *Jayco Sys.*, 777 F.2d at 313-14 & n.21; *Practice Perfect*, 732 F. Supp. at 803. Moreover, as Ashley admits in its Petition, its damage study did not identify any allegedly lost sales by it before 1994 – two years after Chevron sold the pipeline.

Ashley improperly tries to establish its standing based merely upon the allegation of an antitrust violation.

### B. The Court Of Appeals' Holding That Ashley Had Not Shown An Antitrust Injury To Property Does Not Provide A Basis For Grant Of The Petition Because The Holding Is Based Upon Settled Law

Ashley argues that the Court of Appeals' "rule" on the injury to property issue shatters several precedents and is far-ranging in consequence. Ashley's arguments are without merit because each mischaracterizes the Court of Appeals' "rule."

Ashley argues that the Court of Appeals' "rule" eliminates the injury to property prong of Section 4. It does not. In deciding that Ashley had not shown an antitrust injury to property, the Court of Appeals held that, because Ashley sought to recover lost profits for an allegedly thwarted business, it could not rely upon mere ownership of the property (its phosphate leases) it claimed it would have used to develop the mining business to prove its antitrust standing. *Ashley Creek*, 315 F.3d at 1260. Rather, Ashley had to satisfy the settled "intent and preparedness" test. To the extent this unremarkable holding establishes a "rule," the "rule" merely applies settled principles of antitrust standing in a particular set of factually "narrow circumstances." *See id.* at 1260 & n.16. It does not provide a basis for a grant of Ashley's Petition. It leaves intact the full range of situations where a plaintiff has antitrust standing because the plaintiff seeks to recover for antitrust injury to its property, including the situation in *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979).

The Court of Appeals merely applied the settled antitrust standing rule that a plaintiff must establish an antitrust injury and a direct causal link between the injury and the antitrust violation, *see, e.g., Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977), to the "narrow circumstance" where a plaintiff claims injury to an inchoate business that would have used the subject property. *Ashley Creek*, 315 F.3d at 1260. In such a narrow circumstance, the Court of Appeals recognized, a plaintiff, such as Ashley, does not claim or show any injury to its property alone – no clouding of title, or deprivation of title. Therefore, the plaintiff cannot rely upon the mere ownership of the property to prove its standing because it does not thereby prove an injury caused by an antitrust violation. The only real use or value of Ashley's State mining leases was to facilitate a mining business. If the plaintiff cannot show it was prepared to embark upon that business, or for that matter that the purported business was even viable, the leases had no real value before any alleged antitrust violation occurred.

If, as Ashley contends, a plaintiff could rely upon mere possession of property that it claims it would have used to go into a business it cannot prove was viable, then the antitrust standing rule requiring an antitrust injury directly caused by an antitrust violation would be eviscerated. Under the rule proposed by Ashley, any property interest, even the ownership of a vehicle, would provide a plaintiff with standing to claim lost profits despite the lack of any showing of an actual business interest that in fact was injured by an antitrust violation.

Ashley argues that the Court of Appeals' "rule" ignores that a plaintiff's "rights of access" and "right to use" its property to develop a business are property rights such

that any injury to them can afford standing. Ashley relied upon its leases to establish its antitrust standing in the courts below rather than a claimed "right of access." Ashley presents no exceptional circumstances for this Court to review the issue originally.

Moreover, Ashley does not claim injury to any right qualifying as a property right independent from injury to its allegedly thwarted mining venture. Indeed, the record is clear that Ashley owned and still owns the leases and nothing has affected its right of access to that property. *See Utah v. Andrus*, 486 F. Supp. 995, 1002 (D. Utah 1979). Ashley claims injury strictly to its allegedly thwarted mining venture such that the "rights" it now asserts, its "right of access" and "right to use" its leases, merely are "rights" to go into business. As the Court of Appeals' "rule" recognizes, for a plaintiff to have standing to claim an antitrust violation interfered with its "right" to go into business, it is settled law that the plaintiff must satisfy the "intent and preparedness" test.

Ashley also argues that the Court of Appeals' "rule" conflicts with the rules that: (1) any injury from an antitrust violation is sufficient to show standing, and (2) the issue of the degree to which the value of property is impaired by an antitrust violation is a question of damages, not standing. There is no such conflict. Contrary to Ashley's argument, the Court of Appeals required Ashley to satisfy the "intent and preparedness" test not because it failed to show either a sufficient injury to its property or the ultimate success of its allegedly thwarted mining venture, but because it was claiming injury to an alleged

inchoate business interest of which the mining leases were nothing more than an integral part.

## CONCLUSION

For the foregoing reasons, Chevron respectfully submits that Ashley's Petition for Writ of Certiorari be denied in full.

DATED this 1st day of August, 2003.

Respectfully submitted,

BERMAN, TOMSIC & SAVAGE
E. SCOTT SAVAGE
STEPHEN R. WALDRON
50 South Main Street,
Suite 1250
Salt Lake City, Utah 84144

Supreme Court, U.S.
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No. 02-1758

IN THE

# Supreme Court of the United States

ASHLEY CREEK PHOSPHATE COMPANY,

*Petitioner,*

*v.*

CHEVRON U.S.A., INC., *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

## BRIEF IN OPPOSITION FOR SF RESPONDENTS

WILLIAM H. ADAMS, ESQ.
YOUNG ADAMS & HOFFMAN, LLP
170 South Main Street
Suite 1125
Salt Lake City, UT 84101
(801) 359-1900

*Attorneys for Respondents SF Phosphates Limited Company, SF Pipeline Limited Company, and FS, Inc.*

PETER W. BILLINGS
*Counsel of Record*
DOUGLAS B. CANNON
FABIAN & CLENDENIN
215 South State Street
Suite 1200
Salt Lake City, UT 84151
(801) 531-8900

*Attorneys for Respondent J. R. Simplot Company*

JAMES S. JARDINE
JONATHAN A. DIBBLE
CAMERON M. HANCOCK
RAY, QUINNEY & NEBEKER
79 South Main Street
Salt Lake City, UT 84145
(801) 532-1500

*Attorneys for Respondent Farmland Industries, Inc.*

## CORPORATE DISCLOSURE STATEMENT

Respondent J. R. Simplot Company ("Simplot") has no parent corporations and no publicly held company owns ten (10%) of its stock. Respondent Farmland Industries, Inc. ("Farmland") has no parent corporations and no publicly held company owns ten (10%) of its stock. Respondent SF Pipeline Limited Company, a limited liability company ("SF Pipeline") has a parent company, Respondent SF Phosphates Limited Company, a limited liability company ("SF Phosphates"). No publicly held company owns more than ten percent (10%) of SF Pipeline. Respondent SF Phosphates' and Respondent FS, Inc.'s parent companies are Simplot and Farmland. No publicly-held company, other than Farmland, owns more than ten percent (10%) of SF Phosphates or FS, Inc. Simplot, Farmland, SF Pipeline, SF Phosphates and FS, Inc. are collectively referred to in this brief as the SF Respondents.

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## STATEMENT OF THE CASE

Without the slightest effort to justify a grant of certiorari in this case, Petitioner Ashley Creek Phosphate Company ("Ashley Creek") simply asserts that the Court of Appeals for the Tenth Circuit was wrong. In fact, the Tenth Circuit was correct. But even if the Tenth Circuit erred in its application of antitrust standing law, nothing in the Petition even suggests a necessary "compelling reason" for this Court to exercise its discretion in favor of certiorari. Instead, Petitioner lists ten separate issues for this Petition, apparently hoping by volume to overcome the absence of a certiorari-worthy question. The holdings of both the district court and the Tenth Circuit were unremarkable. Because Ashley Creek was not prepared to enter the phosphate concentrate market, Ashley Creek lacked standing to bring its antitrust claims. Ashley Creek failed to take the most elementary steps to prepare to enter the phosphate concentrate market. Although Ashley Creek's claim is that the pipeline tariff was too high and thereby prevented it from entering the market, Ashley Creek did not know whether it could feasibly mine, ship and sell phosphate concentrate even if the tariff had been zero.

In 1981, Chevron[1] acquired an operating phosphate mine located near Vernal, Utah. Between the years 1984 and 1986, Chevron expanded the mine, constructed a phosphate fertilizer plant in Rock Springs, Wyoming and built a slurry pipeline to transport its phosphate concentrate from the Vernal mine to the Rock Springs fertilizer plant. Chevron spent over $241 million on this project.

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1. Respondents Chevron Corporation, Chevron U.S.A. Inc., Chevron Chemical Company, Chevron Pipe Line Company and Chevron Industries, Inc. are collectively referred to as "Chevron."

Ashley Creek, a company with no employees, no operations, and income and expenses of less than $2,000, owned state phosphate leases contiguous to the phosphate deposits and mine purchased by Chevron. Ashley Creek did not propose to build a fertilizer plant of its own; instead, its purported plan was to mine phosphate, haul it seven miles to Chevron's pipeline, ship to Rock Springs on Chevron's slurry pipeline, dry the slurry and then ship it by rail to fertilizer plants hundreds, if not thousands, of miles away.

After Chevron constructed its pipeline, Ashley Creek requested from Chevron rate information for the shipment of phosphate slurry through the pipeline. Although Chevron provided Ashley Creek with preliminary rate estimates, Chevron did not publish a tariff. In November 1986, Ashley Creek filed a complaint with the Interstate Commerce Commission ("ICC") asserting that Chevron must publish a tariff for the pipeline. In January 1989, the ICC ruled that Chevron must publish a tariff.

On June 19, 1989, Ashley Creek filed an antitrust lawsuit against Chevron alleging that Chevron had excluded Ashley Creek from the phosphate concentrate market: 1) by not publishing a tariff for the pipeline; and 2) when required to publish a tariff, by publishing a tariff that was unreasonable and discriminatory. Chevron and Ashley Creek stipulated to stay the antitrust case and to refer to the ICC[2] the determination of whether the rates that Chevron established in its tariff for transporting phosphate rock through its pipeline were "unjust, discriminatory or unreasonable." While the matter was pending before the ICC,

2. In 1995, the ICC was abolished and this proceeding was transferred to the Surface Transportation Board ("STB").

Chevron published a second tariff in August of 1991 and a third tariff in February of 1992. Each tariff reduced the rates of the prior tariff.

In April of 1992, Chevron sold its integrated phosphate fertilizer project to the SF Respondents.[3] The SF Respondents immediately adopted the Chevron tariff then in effect. Ashley Creek joined the SF Respondents to the ICC proceeding and in April of 1996 joined the SF Respondents in the antitrust action against Chevron.

On October 28, 1996, the STB issued its decision. The STB found that the published tariffs were "unreasonable for shipments at many volume levels" but also concluded "there may be certain shipping patterns where the tariff rate structure would be reasonable." The STB summarized its decision as follows:

> On the record developed in this proceeding, we are unable to determine the size of the phosphate market, nor can we evaluate whether Ashley Creek has the ability to serve that market [footnote omitted]. Rather, it is for the court in the underlying antitrust action to determine whether Ashley Creek was ever in a position to market phosphate, or will be in the future, and to determine the size of the potential; [sic] market for phosphate that could be delivered by this pipeline. It may be that the court will conclude that one of our other volume usage

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3. The SF Respondents consist of SF Phosphates Limited Company, SF Pipeline Limited Company, FS, Inc., J.R. Simplot Company and Farmland Industries, Inc.

> scenarios — or, indeed, a scenario that we did not even consider at all — is more useful for purposes of the antitrust litigation. Our role is simply to assist the court by presenting a framework for addressing the narrow issue that is subject to our primary jurisdiction.
>
> We find:
>
> Defendants' subject tariffs covering the transportation of phosphate slurry from Vernal, UT, to Rock Springs, WY, are unreasonable to the extent discussed in this decision.

Supplemental Appendix to Petition for Writ of Certiorari ("Supp. App.") at 49-50.

Ashley Creek subsequently amended its complaint against Chevron and the SF Respondents incorporating language from the STB decision. On January 1, 1999, the SF Respondents adopted a fourth and still lower tariff for the pipeline. The fourth tariff only collected fixed costs and provided no recovery for original construction costs or the cost of capital. As with the prior tariffs, Ashley Creek did nothing to develop its phosphate leases under the fourth tariff.

After sixteen months of discovery, the SF Respondents filed a motion for summary judgment against Ashley Creek on several grounds. First, the SF Respondents argued that Ashley Creek did not have standing because it was not prepared to enter the phosphate concentrate business.[4]

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4. The SF Respondents also argued and the district court agreed that Ashley Creek lacked standing because Ashley Creek could not establish a causal nexus between the alleged violation (an unreasonable tariff) and the alleged injury (exclusion from the market).

Second, the SF Respondents argued that the addition of the fourth tariff and updated volumes under the STB methodology rendered the tariffs reasonable and that a reasonable tariff cannot be exclusionary as a matter of law. In support of the motion, the SF Respondents listed 72 undisputed facts, not one of which was disputed by Ashley Creek. Among the undisputed facts[5] conclusively establishing that Ashley Creek was not prepared to enter the phosphate market and thus did not have standing were the following:

> 2. Ashley Creek has never had any paid employees and Ashley Creek has had only a few thousand dollars in reported expenses and income.
>
> 8. Ashley Creek's only feasibility study concerned entering the phosphate business. In 1985, David Aro, a consulting mining engineer paid by [Ashley Creek and owner], prepared a "Type 1" feasibility study describing how Ashley Creek would mine, mill and ship phosphate concentrate.
>
> 9. According to the guidelines used by Aro and others in the industry, a Type 1 feasibility study is very preliminary and "is seldom adequate for positive acceptance of a project."
>
> 16. In July 1992, David Aro, [sic] updated his 1985 written estimate of the cost for Ashley Creek to construct a mine, mill and related

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5. These key undisputed facts are taken as verbatim out of the SF Respondents' motion for summary judgment. The original numbers are listed with each fact.

facilities. The cost to construct just the mine, mill and related facilities (but not a Vernal to Rock Springs pipeline or fertilizer plant) was estimated by Aro to be $67 million. This was more than SF paid Chevron for the mine, mill, pipeline and phosphate plant.

17. Aro's July 1992 updated cost estimates were $36.11 per ton at Rock Springs with a margin of error of +/- 25%, or ranging from $27.08 to $45.14. These numbers used $3.05 per ton as the operating and amortization of cost of the Vernal to Rock Springs pipeline.

21. Ashley Creek has had no discussions with any source of financing as to the amount they would advance, the interest rate they would charge, or the equity percentage, if any, they would require.

27. Ashley Creek has never discussed price with *any* potential customer, let alone obtained a signed contract specifying the price.

32. Ashley Creek has never prepared a feasibility study showing that Ashley Creek could produce phosphate concentrate at a cost (including shipping costs from Rock Springs) that would be less than the price for which it could sell the concentrate.

33. Ashley Creek had not entered into contracts to construct the mine and milling facilities at its Vernal locations.

34. Ashley Creek has not entered into contracts to construct the 7-mile pipeline from its proposed mine and mill to the origin of the SF pipeline.

35. Ashley Creek has not entered into contracts to construct the rail loading, drying and storage facilities it will need at Rock Springs, Wyoming if it intends to ship concentrate from Rock Springs.

37. Although Ashley Creek claims it could sell phosphate concentrate "FOB Rock Springs," and acknowledges that the freight cost from Rock Springs to the purchaser's location is critical, Ashley Creek has not investigated or otherwise determined the cost to ship from Rock Springs to the sites of the phosphate fertilizer plants.

41. Ashley Creek has never done any analysis to determine whether the tariffs have in fact prevented Ashley Creek from selling its product or developing its project.

47. Ashley Creek has stated that it will not develop its leases unless it holds an equity interest in the pipeline.

The district court granted the SF Respondents' motion for summary judgment. *Ashley Creek Phosphate Co. v. Chevron*, 129 F. Supp. 2d 1299 (D. Utah 2000). The district court ruled that Ashley Creek did not have standing because it was not prepared to enter the market and that any injury to property was too speculative. *Ashley Creek Phosphate Co. v. Chevron USA, Inc.*, 315 F.3d 1245, 1252 (10th Cir. 2003). The district court, applying the STB methodology to all four

tariffs and updated volumes, found all tariffs reasonable and as a matter of law not exclusionary. *Id.* at 1253. Contrary to Ashley Creek's assertions in its Petition, the district court did not rely on its decision finding the tariff reasonable to reject Ashley Creek's argument that preparation was "futile." *Id.* at 1257-59.

The Tenth Circuit affirmed the district court's decision on standing, agreeing that Ashley Creek was not prepared to enter the market and, thus, had failed to show antitrust injury to business or property. *Id.* at 1261. Because it upheld the dismissal of Ashley Creek's claims on standing, the Tenth Circuit did not reach the district court's decision on the whether the tariff was reasonable and thus not exclusionary. *Id.*

## REASONS TO DENY THE PETITION

### I. The Tenth Circuit's Decision Below Does Not Present Issues Favoring Review By This Court.

#### A. The Tenth Circuit's Opinion Does Not Create A Conflict With This Court's Decisions or Any Circuit Opinion.

Ashley Creek argues that the Tenth Circuit's decision fails to properly recognize injury to Ashley Creek's property and conflicts with this Court's decision in *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979). Both arguments are wrong and neither presents a reason for review by this court.

In *Reiter*, this Court held that a consumer who pays a higher price for retail goods is injured in his or her property and that the term "injury to property" is not confined to commercial interests or enterprises. *Id.* at 339-340. Nothing

in the Tenth Circuit's decision in this case is to the contrary. The Tenth Circuit did not hold that Ashley Creek's leases cannot be "property" under Section 4 of the Clayton Act. Nor did the Tenth Circuit decision limit "property" to a commercial context. Rather, the Tenth Circuit focused on Ashley Creek's failure to establish any injury to its property. "We reject Ashley Creek's assertion that possession of property alone confers standing. The language of the Clayton Act makes clear that it is injury to property, rather than its mere possession, that confers standing." *Ashley Creek*, 315 F.3d at 1260.

The Tenth Circuit correctly noted that Ashley Creek had failed to present any evidence that the leases were less valuable after the "supposedly anti-competitive acts than they were before those acts." *Id.* The Tenth Circuit stated that "there is not a single citation to the record in that section of Ashley Creek's brief relating to its claim of injury to property." *Id.*

Ashley Creek also argues that the district court's decision finding the tariffs reasonable, and the Tenth Circuit's refusal to overrule that decision, contravene this Court's decisions in *Great Northern Ry. v. Merchants Elevator Co.*, 259 U.S. 285 (1932), *Georgia Pub. Serv. Comm'n. v. United States*, 283 U.S. 765 (1930), and *United States v. New River Co.*, 265 U.S. 533 (1923). Ashley Creek argues that, under these cases, the district court lacked authority to alter an agency action and find the tariffs reasonable when the STB had declared the tariffs unreasonable under certain scenarios. This argument fails on the merits for at least two reasons.

First, because it disposed of the case on lack of standing, the Tenth Circuit did not even review the district court's finding that the tariffs were reasonable under the STB decision. Because the issue was not addressed by the Tenth Circuit, this case does not present exceptional circumstances that would warrant a review of Ashley Creek's argument by this Court. *See Singleton v. Wolff*, 428 U.S. 106 (1976) (general rule is that a federal appellate court does not consider an issue not passed on below).

Second, as a matter of fact, the district court's decision did not alter an agency decision. The district court did what the STB invited it to do: apply the STB methodology to the tariff rates and volumes determined by the district court. The STB expressly stated: "[o]ur role is simply to assist the court by presenting a framework for addressing the narrow issue that is subject to our primary jurisdiction." Supp. App. at 50. The STB noted that it was for the district court to determine whether Ashley Creek could ever market phosphate concentrate and to determine other matters such as volume scenarios. The district court applied that "framework" in this case by using the actual tariff rates and, for purposes of summary judgment, assumed that Ashley Creek would enter the market and ship the volumes it claimed it would. Using Ashley Creek's best case, the district court found the tariffs were reasonable under the STB methodology.

Ashley Creek does not assert with respect to the issues any other conflict with the decisions of this Court or any conflict between the circuits.

### B. The Petition Does Not Raise Any Important Question of Federal Law.

The legal standard for antitrust standing of a plaintiff not already in the market is well settled. As a potential entrant, Ashley Creek must "demonstrate a preparedness to enter the market." *Curtis v. Campbell-Taggart, Inc.*, 687 F.2d 336, 338 (10th Cir. 1982), *cert. denied*, 459 U.S. 1090 (1982). *See also Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 994 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978); *Indium Corp. of America v. Semi-Alloys, Inc.*, 781 F.2d 879, 882 (Fed. Cir. 1985), *cert. denied*, 479 U.S. 820 (1986); *Pennsylvania Sugar Rfg. Co. v. American Sugar Rfg. Co., et al.*, 166 F. 254, 260 (2nd Cir. 1908); *Triangle Conduit & Cable Co., Inc. v. National Electric Products Corp.*, 152 F.2d 398, 399 (3rd Cir. 1945); *Martin v. Phillips Petroleum Company, et al.*, 365 F.2d 629, 633 (5th Cir. 1966), *cert. denied*, 385 U.S. 991 (1966); *Huron Valley Hospital, Inc. v. City of Pontiac, et al.*, 666 F.2d 1029, 1033 (6th Cir. 1981); *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466, 475 (7th Cir. 1983), *cert. denied*, 461 U.S. 958 (1983); *Central Telecommunications, Inc., v. TCI Cablevision, Inc.*, 800 F.2d 711, 727-728 (8th Cir. 1986), *cert. denied*, 480 U.S. 910 (1987); *Bubar v. Ampco Foods, Inc.*, 752 F.2d 445, 450 (9th Cir. 1985), *cert. denied*, 472 U.S. 1018 (1985); *Gas Utilities Co. of Ala., Inc. v. Southern Natural Gas Co.*, 996 F.2d 282, 283 (11th Cir. 1993), *cert. denied*, 510 U.S. 1042 (1994). No court of appeals has held to the contrary. The courts have identified four key elements in evaluating preparedness: (1) ability to finance the business and purchase the necessary facilities; (2) consummation of contracts towards entering the business; (3) affirmative action by the plaintiff to enter the market; and, (4) the experience and background of the plaintiff in the particular business.

*E.g.*, *Curtis.*, 687 F.2d at 338; *Hecht*, 570 F.2d at 994; *Huron Valley*, 666 F.2d at 1033; *Gas Utilities*, 996 F.2d at 283; *Martin*, 365 F.2d at 633-34; *Bubar*, 752 F.2d at 452; *Go-Video, Inc v. Matsushita Elec. Indus.* (*In re Dual-Deck Video Cassette Recorder Antitrust Litigation*), 11 F.3d 1460, 1465 (9th Cir. 1993).

Whether a plaintiff has satisfied this well-established test requires a court to look at the individual facts of each case. In this case, both the district court and Tenth Circuit concluded that Ashley Creek's preparation was far below the standards enunciated by the Tenth Circuit and other Courts of Appeal. A third review by this Court of whether Ashley Creek's activities constituted sufficient preparation for antitrust standing is not a "compelling reason" for this Court to grant the Petition.

## II. The Tenth Circuit And District Court Acted Correctly In Rejecting The Arguments Ashley Creek Now Raises.

### A. There Is No Evidence That Ashley Creek's Property Was Injured.

As discussed above, the Tenth Circuit held that "mere possession" of property is not enough to confer standing. A plaintiff must show injury to property for antitrust standing purposes. The Tenth Circuit correctly recognized that Ashley Creek had "simply not put forward even a scintilla of evidence to demonstrate that it suffered any harm to its property at the hands of Chevron and SF." *Ashley Creek*, 315 F.3d at 1261. Rather, Ashley Creek's claimed injury was to a proposed business. As noted by the Tenth Circuit, Ashley Creek had done almost nothing to prepare for entry into the

phosphate concentrate business. *Id.* at 1257-58. It had no employees or assets. *Id.* It had not talked to anyone about financing. *Id.* It had not talked to customers about the price for its phosphate concentrate. *Id.* at 1255-56. Ashley Creek had not even done a feasibility study to determine if it could sell its phosphate concentrate at any price. *Id.* Ashley Creek even admitted that it "has never done any analysis to determine whether the tariffs have in fact prevented Ashley Creek from selling its product or developing its project." Undisputed facts, *supra*, 7 at ¶41. Based on these facts and others, the lower courts declared that Ashley Creek had no standing. In fact, both the district court and the Tenth Circuit cited to a document written by Ashley Creek's engineer that stated:

> I have felt for some time that the level of *legal effort* far exceeds the level of *technical data* that is essential to verifying the reserves and costs. Without "proven" reserves and "acceptable" costs, the legal arguments could be "hypothetical and meaningless."
> At the present time –
> 1-No proven reserves, only prob. And prosp.
> 2-No detailed estimate of acceptable capital costs and operating costs
> 3-No definition of metallurgy needed for conceptual plant design
> Pipeline tariff-only *ONE* of many cost facts-If in range of $3.00 to $4.00, no problem-other technical data acquisition can proceed!!

*Ashley Creek*, 315 F.3d at 1258; *Ashley Creek*, 129 F. Supp. 2d at 1305 (emphasis in original).

Ashley Creek cites only one case for its proposition that its property has been damaged so as to confer standing. *Waldron v. British Petroleum Co.*, 231 F. Supp. 72 (S.D.N.Y. 1964). The plaintiff in *Waldron* had a "highly desired contract" with the Iranian Oil Company to purchase oil. *Id.* at 78. The plaintiff alleged a conspiracy among the defendants (the world's major oil companies) to refuse to purchase the contract from the plaintiff. The district court in *Waldron* held that the plaintiff was *not* prepared to enter the business of selling oil, but that the contract was "property," in the relevant sense, *because* the plaintiff had tried to sell the contract and the defendants *collectively* refused. *Id.* at 86-87. The Tenth Circuit correctly distinguished *Waldron* on several grounds. First, it noted that "the record in this case is completely devoid of evidence relating to the value of the leases during the relevant time periods." *Ashley Creek*, 315 F.2d at 1260. Second, it noted Ashley Creek has not alleged either that it tried to sell the leases or that defendants have refused to buy its leases. *Id.* Finally, Ashley Creek's president and sole shareholder testified unequivocally that the leases were not for sale. *Id.*

### B. The Courts Below Correctly Considered The STB Decision And Properly Rejected Ashley Creek's Attempts To Use The STB Decision To Excuse Preparation To Enter The Phosphate Concentrate Business.

Ashley Creek argues that the STB decision established that the tariff was unreasonable and thus, as a matter of law, was exclusionary. Ashley Creek then claims that because of this exclusionary tariff it could not engage in meaningful preparation and therefore should be excused from preparing

to enter the market on futility grounds. In essence, Ashley Creek argues that the STB decision excused its failure to prepare.

The lower courts properly rejected Ashley Creek's futility exception argument because Ashley Creek did not even perform the most basic preparatory steps to entering the market. The SF tariff, *even assuming it was too high*, did not prevent Ashley Creek from determining: (1) what price customers would pay; (2) the freight costs to ship from Rock Springs; or (3) its own costs with sufficient precision to know whether a few dollars difference in the tariff would make any difference. Ashley Creek did not even determine whether it could sell phosphate concentrate if the tariff was zero. Such elementary acts of preparation would not have been futile. They are acts that anyone thinking about entering a market requiring $67 million in capital expenditures would do, even if the tariff were zero. Any truly serious entrant, not to mention the investors and/or lenders, would want to know whether a project was feasible based on its estimated $67 million investment.

Even when a defendant's conduct arguably makes preparation difficult, the plaintiff must *still* take preparatory steps to show the business is viable. For example, in *Gas Utilities Co. of Ala., Inc. v. Southern Natural Gas Co.*, 825 F. Supp. 1551, 1561-62 (N.D. Ala. 1992), *aff'd*, 996 F.2d 282 (11th Cir. 1993), *cert. denied*, 510 U.S. 1042 (1994), the court required that plaintiff demonstrate preparation under the four factors even though the alleged violation was defendants' refusal to allow plaintiff access to a pipeline. The court held that a claim of futility cannot be used to excuse substantive preparation: "[w]hile the court does not hold that plaintiff had to lay pipeline after Southern rejected its

requests, plaintiff cannot simply use Southern's denial to create an inference of antitrust injury to business or property." *Id.* at 1573.

None of the "futility" cases cited by Ashley Creek are to the contrary. All of those cases evaluate preparation by using the four factors discussed above and measuring the plaintiff's performance against those four factors. In *Hecht v. Pro-Football Inc.*, 570 F.2d 982 (D.C. Cir. 1976), *cert. denied*, 436 U.S. 956 (1978), the court applied the four part test and stated that a plaintiff's preparation must be at "a stage where it is accompanied by certain indicia of ultimate success." *Id.* at 994. In *Fleer Corp. v. Topps Chewing Gum, Inc.*, 415 F. Supp. 176, 180 & n.2 (E.D. Pa. 1976), the plaintiff was already a competitor of the defendant in several product areas and had in place the necessary manufacturing and marketing operations to enter the new market. In *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566 (11th Cir. 1991), the plaintiff was already an established real estate broker in the market serviced by defendant. Similarly, in *Jayco Systems, Inc. v. Savin Business Machines Corp.*, 777 F.2d 306 (5th Cir. 1985), the plaintiff already competed with defendant in the sale of copy machines. In this case, Ashley Creek has not only never entered *any* market, but it failed to determine whether a market even existed for its hypothetical product even if the tariff were zero.

Moreover, this is not a case where Ashley Creek was refused access to the pipeline. The complaint is that the tariff was too high, thereby effectively keeping Ashley Creek from entering the market. But Ashley Creek admits that it "has never done any analysis to determine whether the tariffs have in fact prevented Ashley Creek from selling its product or developing its project." Undisputed facts, *supra*, at 7 ¶41.

Given that admission, it is logically impossible for Ashley Creek to argue, let alone prove, that the tariff prevented it from preparing to enter the market.

Finally, Ashley Creek claims that the lower courts should have allowed it to show after-the-fact preparation through an expert report prepared as part of litigation. Again, this ignores the legal test for standing for at least three reasons. First, acts of preparation must be shown at the time of the alleged antitrust violation. *See Curtis*, 687 F.2d at 338 (the four "key elements" are not stated in the subjunctive, but in the present tense.). Similarly, other courts have held that acts of preparation must be shown *at the time* of the alleged antitrust violation. *E.g.*, *Practice Perfect, Inc. v. Hamilton County Pharm. Assn.*, 732 F. Supp. 798, 803 (S.D. Ohio 1989); *Bubar*, 752 F.2d at 452. *See also Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 129 (1969) (where this Court held that plaintiff must have been prepared to enter the market during the damage period, not at some later time).

Thus, the courts have considered the four factors based on the evidence of what the plaintiff had done to show preparation, not what the plaintiff *possibly might have done*. For example, with respect to financing:

> The mere possibility of financing being available in the abstract is not enough. Showing that someone somehow could possibly obtain financing is not the same as showing that the plaintiffs themselves were able and prepared to do so.

*Hayes v. Solomon*, 597 F.2d 958, 975 (5th Cir. 1979), *cert. denied*, 444 U.S. 1078 (1980). In *Hayes*, the plaintiff

had a commitment for approximately one-half of the necessary $14 million project cost and claimed a bank would have loaned the rest. However, the Fifth Circuit found the anticipated financing insufficient. Here, Ashley Creek has not even seriously discussed financing with anyone, let alone obtained a commitment for financing. Thus, Ashley Creek's reliance on expert affidavits is misplaced, since, at best, it represents conjecture of what financing sources *might have offered.*

Second, Ashley Creek cites no authority for using after-the-fact experts to establish preparation. There is, however, authority to the contrary. In *Hayes*, 597 F.2d at 975, the Fifth Circuit reversed a jury verdict on the ground that the plaintiff lacked standing, and specifically rejected plaintiff's list of activities showing preparation as "relat[ing] mostly to their trial preparation." In the words of the Fifth Circuit: "[t]oo little was too early; too much was too late." *Id.* Ashley Creek's reliance on its expert reports, whatever such reports may say, is simply too late to establish standing.

Third, even assuming expert reports could be used to demonstrate what *could have been done*, Ashley Creek has not made a showing that such preparation was futile. Ashley Creek has not offered any explanation as to why the expert reports were not, or could not have been, done at the time of the violation.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM H. ADAMS, ESQ.
YOUNG ADAMS & HOFFMAN, LLP
170 South Main Street
Suite 1125
Salt Lake City, UT 84101
(801) 359-1900

*Attorneys for Respondents SF Phosphates Limited Company, SF Pipeline Limited Company, and FS, Inc.*

PETER W. BILLINGS
*Counsel of Record*
DOUGLAS B. CANNON
FABIAN & CLENDENIN
215 South State Street
Suite 1200
Salt Lake City, UT 84151
(801) 531-8900

*Attorneys for Respondent J. R. Simplot Company*

JAMES S. JARDINE
JONATHAN A. DIBBLE
CAMERON M. HANCOCK
RAY, QUINNEY & NEBEKER
79 South Main Street
Salt Lake City, UT 84145
(801) 532-1500

*Attorneys for Respondent Farmland Industries, Inc.*

(6)

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No. 02-1758

In the

# Supreme Court of the United States

ASHLEY CREEK PHOSPHATE CO.
&
STATE OF UTAH

*Petitioners,*

*v.*

CHEVRON USA, INC. et al.

*Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

## REPLY TO BRIEFS IN OPPOSITION

E. Craig Smay
*Counsel of Record*
c/o E. Craig Smay, P.C.
174 E. South Temple
Salt Lake City, UT 84111
(801) 539-8515
*Attorney for Petitioner.*

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INTRODUCTION. Defendants' Briefs in Opposition try to show that the Court of Appeals has applied an established rule that a prospective business, to have antitrust standing, must show "intent and preparation to enter", and a "futility exception" to that rule. Also, the Court properly treated plaintiff's leaseholds as personalty used in a prospective business. This raises no issues worthy of certiorari. In fact, by holding that a court may ignore the nature of the violation as a barrier to entry (by ignoring binding agency rulings) in applying the "preparation" rule, and by requiring "preparations" *after* erection of barriers to entry, the Court of Appeals has inflated the "intent and preparation" rule, and eliminated any "futility exception". It mistook the injury alleged and the property injured, imposing a rule that narrows the scope of "property" under Clayton Act §4.

Defendants attempt to inject a factual basis for the ruling not adopted by the District Court below.[1] Neither

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[1] The SF Defendants insert a list of "undisputed facts" submitted with their Motion for Summary Judgment, which plaintiff did not then deny. Brief 5-7. However, the Motion was advanced to avoid expert studies to be filed on the discovery schedule. The "undisputed facts" numbered 21, 32, 37, and 41, true at the date of the Motion, were rendered false by the filing of expert studies during the pendency of the Motion. This explains the District Court's treatment of these alleged facts.

"Undisputed fact" number 47 contained the correct tense of the verb because it referred to testimony in 1998 that Ashley "will not" go forward without divestiture while unreasonable tariffs prevailed. The District Court and the Court of Appeals converted this into "testimony that Ashley Creek *would not* move forward with its project", as if that had always been Ashley's position. App. at 18

Brief, however, disputes that:

1. The defect alleged in plaintiff's "preparations to enter"

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(emphasis added). That violates the rule of construction on motions for summary judgment and is unsupported by the record.

The Chevron Defendants assert as "misstatements of fact" disagreements with interpretations of the evidence which Chevron failed to persuade the District Court to adopt. These assertions were resolved against Chevron on earlier motions, or were disputed below and not resolved by the District Court on Defendants' Motions for Summary Judgment. Such allegations are irrelevant on the present Petition. These include (Brief 4-15): (1) Trucking was cheaper than piping, but bad for public relations; (2) Trucking remained a viable alternative to piping; (3) Pipeline and drying costs prevented third party sales; (4) Western mines produce 6-12% of total phosphate concentrate and compete with Florida mines only in the West; (5) There are eight fertilizer producers in the West and Canada, all with ready supply of concentrate ; (6) Chevron diligently tried to sell concentrate, but its price was too high; (7) Cominco was the only third party purchaser of concentrate, and could produce for itself cheaper than Chevron; (8) There were no third party sales from a western mine; (9) There are other Western phosphate deposits available for development; (10) Chevron operated at a loss; (11) Plaintiff "sold" its leases to Mountain Fuel Supply Co., and Utah International; tried to "sell" to Chevron, Cominco, Agrium; (12) Plaintiff's leaseholds were unexplored before 1986; (13) Cominco told Chevron the going price was $24/ton for phosphate concentrate; (14) As late as 1991, there was no data for a "Type-2" feasibility study; (15) Chevron's production and transport costs exceeded what producers would pay for concentrate; (16) ACP never examined freight costs from Rock Springs; (17) ACP never investigated the alternative of trucking; (18) There is no evidence ACP could have sold phosphate concentrate; (19) The pipeline was not essential; (20) ACP justified non-development with litigation; (21) Mr. Archer said he never intended to develop without an interest in the pipeline; (22) The STB determined what "volume scenarios" to test and found the tariffs unreasonable at "some".

prior to the violations was failure to *prepare* a final feasibility study in order to pursue financing.
2. Preparation of such a study was impossible prior to publication of a tariff, as found by the ICC.
3. The District and Circuit Courts had before them an expert feasibility/damage study prepared during the litigation, showing satisfactory costs, a profitable market, and effects of the tariffs.
5. Unless altered by "retroactive reasonableness", the STB Decision found all of the applicable tariffs unreasonable at all shipping volumes indicated by the parties.
6. Unreasonable tariffs discriminated in favor of defendants, and against plaintiff.
7. A right of access through the federal pipeline right-of-way was appurtenant to plaintiff's leaseholds from the State of Utah, implemented by the right of common carriage.[2]

"PREPARATION". The issue on defendants' Motions for Summary Judgment was not whether plaintiff was "prepared to enter business" insofar as a market existed in which it could profitably sell. The issue posed was whether, *prior to the violation*, plaintiff *prepared a final feasibility study* and acted thereon. The *acts* of preparing such a study and pursuing financing were described as "preparations to enter".

It was pointed out that the ICC settled this issue by holding that refusal of a reasonable tariff prevented

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[2] The specific claim of deprivation of a right of access was raised repeatedly in both Courts, Chevron notwithstanding.

formulation of any useful plan to enter. The STB determined that the tariffs subsequently published had not been reasonable. *Preparation* of a final feasibility study *prior* to publication of a tariff was impossible. *Preparation following* publication was futile: the study could not be accurate incorporating discriminatory rates, and such rates prevented competition. Meanwhile, the *facts* regarding costs and markets at times of the violations were shown by an expert feasibility/damage study delivered on the District Court's schedule. *Conceding* that a final feasibility study *prior* to the publication of a tariff had not been possible left the issue whether preparing one *after* the publication was futile.

It was then held, without evidence, that publication of unreasonable tariffs did not "prevent" determining what customers would pay[3], or production and other costs, to determine if plaintiff could afford any tariff. Absent determining these matters, it was not known whether plaintiff would have failed regardless of the tariffs. App. 17-18. Until a study was done, it was held, plaintiff lacked a "business" to injure: the court need not consider whether defendants' behavior was a violation or consider the ICC

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[3] The Chevron defendants confess this was false: "[Plaintiff] never obtained any purchase commitments or sales contracts, which is the only way to establish a price . . . (due to a lack of a public or 'spot' . . . market)". Brief at 11. Without a tariff, plaintiff could not formulate a price to submit to customers; without a reasonable tariff, plaintiff could not calculate a competitive price. Thus, it could not make contracts, and no other means of discerning current prices was available.

and STB Decisions defining whether the refusal of reasonable tariffs erected "barriers to entry". App. 8, n. 5.

This lead to the rejection of "an assertion that a proposed market entrant need take no further preparatory steps . . . after an asserted violation of the antitrust laws by the party in control of an essential facility", based upon *Gas Utilities Co. Of Ala., Inc. v. So. Natural Gas Co.*, 825 F.Supp. 1551 (N.D. Ala. 1992), "holding that plaintiff could not use defendant's denial of access to a pipeline to create an inference of antitrust injury to business or property". App. 24. Even after denial of an essential facility, plaintiff was required to complete "basic preparatory steps". *Gas Utilities*, however, specifically holds that the pipeline "tap" sought there was *not* an essential facility because alternative access was available. 825 F.Supp. at 1574. The rule of *Gas Utilities* is that denial of access to a pipeline does not infer injury to business or property, where such access is not an essential facility. This is consistent with the rule of the Court of Appeals of that Circuit that where defendant creates a "barrier to entry", plaintiff's "reasonable attempt to enter the market" "is sufficient to establish an injury in fact". *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d

1566,1572 (11 Cir. 1991).[4]

The contrary Tenth Circuit rule is unprecedented: the court will ignore any violation that occurs before a final feasibility study, notwithstanding what the study would show, or whether, by creating a barrier to entry, the violation rendered such a study futile as a "preparation to enter". It might be appropriate to require "preparations" *after* an alleged violation, where the violation is not by definition a "barrier to entry" (*Cable Holdings of Georgia v. Home Video, Inc.*, 825 F.2d 1559, 1561 (11 Cir. 1987)), or where the court rejects a claim that the violation is a "barrier to entry" (*Gas Utilities*, supra). It might be appropriate *despite* a violation alleged to be a "barrier to entry", where plaintiff demonstrates first that it could or would not have entered if no barrier had been erected. *Jayco Systems, Inc. v. Savin Bus. Mach. Corp.*, 777 F.2d 306, 314-315 (5 Cir. 1985); *Curtis v. Campbell-Taggert Inc.*, 687 F.2d 336 (10 Cir. 1982), cert. den. 459 U.S. 1090 (1982). No case has held, however, that the court may ignore agency rulings defining the violation as a barrier to entry, in determining whether acts that could only be completed after the violation were required "preparations

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[4] The Court of Appeals is wrong that the plaintiff in *Thompson* "was already an established realtor in the market served by the defendant board of realtors and multiple listing service." Plaintiff had a license and an office in the geographical area served by defendants; he was not in the product market, multi-list services, because defendants withheld the product. 934 F.2d at 1570, 1572.

to enter".[5]

As Chevron asserts, the Tenth Circuit "futility exception" only applies "*if* the plaintiff otherwise shows demonstrated preparation to compete". Brief at 24. An exception that only applies after the rule is satisfied is no exception. It is a rule that "preparations to enter" must be completed after the erection of barriers to entry.[6]

Where plaintiff has the wherewithal and has made a substantial effort to enter, the imposition of a barrier to entry constitutes injury in fact. This does not violate the rule that a violation without an injury is not actionable; it recognizes that the barrier itself is an injury where plaintiff has wherewithal and has done all "preparation" that makes sense. It is the natural result of the rule that it is as illegal to keep competitors out of business as it is to drive them out. It prevents defendants taking advantage of standing by preemptive denial of required access to common carriers.

"PROPERTY". The Court of Appeals treats the word "property" as it appears in §4 of the Clayton Act as a reference to common personalty, which can only be

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[5] Mr. Aro's 1993 notes indicating frustration at the futility of further exploration while resources were consumed in legal efforts to correct unreasonable tariffs, do not detract from assertion of the futility exception here.

[6] The Court of Appeals is wrong again that any of the cases citing a futility exception to the preparation rule requires that the rule be satisfied before the exception applies.

"injured" in a business venture. ". . . when the plaintiff's claimed injury to property flows from its claim that it would have used the property as part of an anticipated business venture", the Court of Appeals considers plaintiff's "lack of preparedness to enter" business in determining whether an injury to property is shown. App. at 28. In context, this means that where lack of a final feasibility study at the time of the violation results in a decision that there then existed no business to injure, plaintiff may not support a claim of injury to existing *property* with a later study showing all an earlier feasibility could show.

*Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979) establishes that deprivation of property is injury to property under Clayton Act §4. Prevention of development of mineral property by deprivation of a right of access to market through the only property providing such access, is injury to the mineral property, causing damages of lost profits of the development. The ICC and STB Decisions establish that defendants thus deprived plaintiff of a right of access through defendants' pipeline.[7] Such injury bears no resemblance to "injury" to vehicles and machines resulting from suppression of a business in which they might have been used. Common personalty is

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[7] *Waldron v. British Petroleum Co., Inc.*, 231 F.Supp. 72 (S.D. N.Y. 1964) indicates that interference with the attempt to exercise a right part of the group constituting a contract, is sufficient for injury to plaintiff's property in the contract, without attempted sale of the contract. 231 F.Supp. at 87.

not a bundle of rights adopted to a discrete purpose, and which can be diminished by interference with one of the rights of which it is composed. Absent breakage or loss of title, it retains its use and value, notwithstanding a particular venture is thwarted. The ruling that mere possession of property does not confer standing ignores both the ICC and STB Decisions, and the fact that plaintiff's leaseholds are both realty and contracts. The claim goes beyond mere possession, and alleges interference with a right of property diminishing the use and value of the property.

With respect to realty and contracts, the source of known claims to date[8], the Court of Appeals' rule is wrong, and particularly as it disregards binding agency rulings establishing interference with rights part of the property. Where property adopted to commercial uses consists of a group of rights - such as commercial real estate, or contracts - interference with such a right may stifle a potential competitor. If the owner is then attempting to use such right, preventing such use is a deprivation of property. Any difficulty in proving lost profits goes to the question of damages, and is not affected by when a damage study is prepared. Failure to recognize such a deprivation as an injury to property, whether or not an injury to business, improperly restricts the scope of Clayton Act §4.

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[8] See, *e.g.*, *North Texas Producers Ass'n v. Young*, 308 F.2d 235, 243 (5 Cir. 1962); *Waldron v. British Petroleum, supra*, 231 F.Supp. at 86; *Hecht v. Pro-Football*, 570 F.2d 982, 993 (D.C. Cir. 1977)..

CONCLUSIONS. The Court of Appeals makes a Catch-22 of the "intent and preparation" test of standing, and its "futility exception": unless "preparations" impossible prior to the violation alleged are performed before the violation, plaintiff may not show that the violation rendered such "preparations" futile. It establishes a precedent that licensees of the public domain to operate a system - for transport, or communication, or transmission - made common to protect competition, may, by preemptive violation of applicable regulations, suppress competition.

The ruling represents a quantum leap in the erection of barriers to enforcement of antitrust laws. It authorizes misuse of the public domain for private monopoly. It is properly the subject of a writ of certiorari.

DATED this 8th day of September, 2003.

E. Craig Smay
*Counsel of Record*
E. CRAIG SMAY, P.C.
174 E. South Temple
Salt Lake City, UT 84111-1102
(801) 539-8515